United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

271

NO. 17,175

LOUIS J. COUREMBIS and
DOROTHY W. COUREMBIS,

Appellants,

v.

INDEPENDENCE AVENUE DRUG FAIR, INC., et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia

FORD E. YOUNG, Jr.
5540 Connecticut Avenue, N.W.
Washington, D. C.

QUESTIONS PRESENTED

1. The question is whether the Court below erred in dismissing the Third Party Complaint on a basis whereby, since the defendants (now appellants) did not allege a claim against third party defendants, the Third Party Complaint was held to have been not in accordance with Rule 14, Federal Rules of Civil Procedure.

2. The question is whether the appellees (third party defendants in the Court below) should be held to be liable to now appellants (defendants and third party plaintiffs in the Court below) for any and all damages which the Plaintiff Corporation in the Court below could possibly prove against the now appellants.

3. The question is whether Rule 14 of the Federal Rules of Civil Procedure allowed appellants to be brought in as third party defendants on the ground that a third party defendant might be liable to either plaintiff or defendant (in the Court below) and whether this Rule should be liberally applied where there is no jurisdictional objection, in order to avoid unnecessary duplication of litigation.

4. The question is whether the misrepresentation of the Secretary of the Appellee Corporation, which was relied upon, as alleged in the complaint against third party defendants, in the Court below should have taken this case out of the classification of cases in which the third party defendant merely happened to have some relationship with the transaction in question.

5. The question is whether Rule 14, F.R.C.P., applies only to cases of insurers, guarantors, sureties, successive warrantors and the like.

6. The question is whether the rendition of justice should have caused the Court below to have exercised the judicial discretion vested in the Court below so as to have caused the Court below to have overruled the Motion to Dismiss the Third Party Complaint.

7. The question is whether the fact that now appellants did not file a suit against now appellees, based upon the misrepresentation, as alleged in the Third Party Complaint, precluded bringing in now appellees as third party defendants in the Court below.

8. The question is whether the fact that the composite of the pleadings in the Court below show that officers of both plaintiff and now appellee corporations made representations which now appellants relied upon, which proved to have been inaccurate, and which brought about a situation in which only appellee corporations benefited from the Eminent Domain case should take this case out of that category of cases to which Rule 14, Federal Rules of Civil Procedure, does not apply.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,175

LOUIS J. COUREMBIS and
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v.

INDEPENDENCE AVENUE DRUG FAIR, INC., et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The Court below granted Third Party Defendants' "Motion to Dismiss Third Party Complaint." Unless this Honorable Court will order a reversal of such dismissal, the same would be a final decision of the United States District Court for the District of Columbia, insofar as the Third Party Defendants are concerned. It is respectfully submitted,

therefore, that the jurisdiction of this Honorable Court is based upon Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

This appeal is based upon the order of the Court below (J.A. 21-22) whereby "Third Party Defendants' Motion to Dismiss Third Party Complaint" (J.A. 15) was granted and the Third Party Complaint filed in the Court below was thereby dismissed. The plaintiff Corporation in the Court below, by and through its Vice President, served as real estate broker in the negotiations of the lease between appellants and appellees.

Said lease was executed on April 8, 1959. The basic features of said lease were to the effect that now appellants, owners of a parcel of real estate, located at 1st and Independence Avenues, S. E., this city, would remodel the buildings located thereon for a Drug Store, under the trade name of "Drug Fair" of the type generally operated by appellees at its location; that the term would be for a ten year period with the privilege of renewal for a second ten year period, and an additional period of renewal for a third ten year period; and that the rental would be a guaranteed Twenty-five Thousand Dollars ($25,000.00) per year, provided, however, that when three and a half percent (3 1/2%) of the gross volume of business in said proposed "Drug Fair" would exceed Twenty-five Thousand Dollars ($25,000.00) the now appellants would have become entitled to the difference also. Pursuant to entering into said lease, now appellants, at an expenditure of from Ninety Thousand Dollars ($90,000.00) to One Hundred Thousand Dollars ($100,000.00), and at a great expenditure of their own time and energy throughout the year which followed, did remodel the premises for a "Drug Fair" and such a business was started on or about April 28, 1960.

Now appellants, in the Third Party Complaint filed in the Court below (J.A. 7-9), contended that in connection with the execution of the said lease dated April 8, 1959, the Secretary of Appellee Corporations

stated to the appellant, Louis J. Courembis, who was then and there negotiating in his individual capacity and as the agent for his wife, the other now appellant, Dorothy W. Courembis, that three and one half per cent (3 1/2 %) of the gross volume of business was the highest percentage that the parent Drug Fair Corporation had ever allowed any of its subsidiary corporations to pay to a landlord. Said Third Party Complaint further alleges that said statement must have been known to the Secretary of Appellee Corporations to have been inaccurate, that said statement was material to the negotiations then and there in progress; that said Secretary of Appellee Corporations must have intended that appellants rely upon such statement, that appellants were without knowledge of the accuracy or inaccuracy of such statement and that in entering into said lease appellants did rely upon such statement and had every reason to believe the same to have been accurate. The foregoing was also brought out in the argument of counsel for now appellants in the hearing of the Motion to Dismiss Third Party Complaint, which said argument was presented in the Court below on June 5, 1962 (J.A. 23-33).

The "Answer and Counter Claim" (J.A. 10-15) filed herein alleged that the Vice President of the Plaintiff Corporation in the Court below overheard the aforesaid statements of the Secretary of Appellee Corporations and that the said Vice President of the Plaintiff Corporation informed now appellants that the proposed lease was the best that now appellees would enter into, that said representation was made to induce the appellants to enter into said lease, that now appellants relied upon such statements by said Vice President of Plaintiff Corporation, and that appellants believed that said Vice President of Plaintiff Corporation was then and there serving the best interests of now appellants and that now appellants had a right to rely upon his statements (J.A. 11 and J.A. 13-14).

By notice filed August 8, 1960, after the Drug Fair had been in operation for a little over three months, the Government of the United States, through duly designated attorneys of the Department of Justice,

notified all parties in interest that a "Complaint in Condemnation" (J.A. 2) had been filed in the United States District Court for the District of Columbia pursuant to an act of Congress approved July 14, 1960, 74 Stat. 509, 519 (Public Law 86 651, 86th Congress). By said Act of Congress, two city blocks consisting of 118 parcels of real estate bounded by Independence Avenue, S.E., on the North, 1st Street, S.E., on the East, C Street, S.E., on the South and 2nd Street, S.E., on the West were to be taken by Eminent Domain Proceedings. The parcel of real estate then owned by now appellants, being at that time lot 882 in square 732 of the land records of the District of Columbia, was designated as the parcel numbered 7 in the exhibit to above referred to notice. Said Eminent Domain proceeding was District of Columbia Docket No. 23-60. On September 17, 1960, now appellants filed their answer to the complaint, as amended, in said Eminent Domain case.

As aforesaid Eminent Domain case developed, it appeared, by the test of the law whereby an award of a tenant is determined, that the interests of now applees, had said case gone to trial, might have been so great as to have left now appellants without sufficient moneys with which to have paid their mortgages and other creditors for expenses and indebtednesses incurred in connection with aforesaid remodeling (there having been a substantial mortgage on the parcel of real estate at the time of entering into the said lease as aforesaid, but appellants at that time had been relatively free of indebtednesses otherwise).

The interest of now appellees was predicated upon the fact that appellees had been primarily responsible in establishing a situation wherein landlords were paid from four to six per cent (4% to 6%) of the gross annual volume of business, in comparable stores, and by the business prognosis of the experts in the employ of appellees to the effect that the volume of business in the store in question would be on such an ascending scale as to exceed a volume of One Million Dollars ($1,000,000.00) within five to six years (J.A. 8-9 and J.A. 27). The position of appellees was further enhanced by the fact that large new buildings were being

erected in the neighborhood with resultant potential increase in volume for the store in question.

Thus, the appellants were forced into a position in which they had to accept the best settlement which could be negotiated. The Eminent Domain case was settled by a stipulation whereby now appellants have been paid the sum of Three Hundred Forty-six Thousand Two Hundred and Fifty Dollars ($346,250.00) and appellees were paid the sum of Sixty -seven Thousand Five Hundred Dollars ($67,500.00) (J.A. 27).

It is, of course, necessary and customary that owners of real estate taken by Eminent Domain proceedings must pay all mortgages, judgments, assignments, and other liens of record, as well as the costs of conducting their case, out of the proceeds from the award or from a settlement with the Government of the United States.

Plaintiff Corporation, acting as a real estate broker collected rentals, as contemplated by the lease referred to hereinabove, and received commissions therefor, as stipulated by said lease, of five per cent (5%) of the monthly rental of Two Thousand Eighty-three Dollars and Thirty-three Cents ($2,083.33) from May 1, 1960 until January of 1961, the Government of the United States having filed a Declaration of Taking on December 21, 1960.

After the aforesaid settlement by now appellants and now appellees with the Government of the United States, Plaintiff Corporation filed the "Complaint for Debt for Services Rendered" (J.A. 1-2) in the Court below and now appellants through their counsel filed a Motion to Dismiss said Complaint (J.A. 3). Counsel for Plaintiff Corporation in the Court below filed their "Opposition to Motion to Dismiss" (J.A. 5-6). At the hearing of said Motion, it developed that the original complaint was in the nature of a suit based upon quantum meruit for the alleged value for the services allegedly rendered by the Plaintiff Corporation, by and through its Vice President, to the now appellants. At said hearing it was agreed that Plaintiffs could file a "Supplemental Complaint" in which it could

also base its claim upon the alleged enhancement of the value of the real estate of now appellants due to the leasing and alleged other efforts of the Plaintiff Corporation. Such Supplemental Complaint (J.A. 6) was duly filed.

Pursuant thereto the "Answer and Counter-Claim" (J.A. 10-15) of now appellants was filed and the necessary steps were taken whereby to file and serve the complaint against third-party defendants (J.A. 7-9).

In addition to a denial of some of the allegations of the Complaint and Supplemental Complaint, now appellants based their defense and counterclaim upon the statements of the Vice President of Plaintiff Corporation and appellant's reliance upon same as aforesaid; upon failure of the Plaintiff Corporation by and through its officers, representatives and employees to have complied with its obligation to appellants, in that the lease in question did not include a provision for the purpose of protecting the interest of appellants in the event of the condemnation of the parcel of real estate in question by the Government of the United States; and, although denying any obligation for services rendered by Plaintiff Corporation or for any enhancement of the value of the parcel of real estate in question by Plaintiff Corporation, that Plaintiff Corporation had been paid for any elements of damages which it could prove against appellants by the percentage of rents collected.

The Third Party Complaint was predicated primarily upon above recited allegations with regard to the statements of the Secretary of Appellee Corporations, the reliance of appellants upon such statements, the situation which forced appellants to enter into the settlement, as set forth hereinabove, and the contention to the effect that if Plaintiff Corporation can prove any damages for services rendered or for the enhancement of the parcel of real estate in question, it was the Appellee Corporations which benefited and not appellants.

In this situation counsel for now Appellees filed "Third Party Defendant's Motion to Dismiss Third Party Complaint" (J.A. 15), and Memo-

randum of Points and Authorities in Support thereof (J.A. 16-19), predicated upon an interpretation of Rule 14 of the Federal Rules of Civil Procedure, and counsel for now appellants filed his "Points and Authorities in Opposition" thereto (J.A. 19-21).

SUMMARY OF ARGUMENT

1. Appellants contend that appellees should be held to be liable for any damages which the Plaintiff Corporation in the Court below could possibly prove against the appellants based upon "quantum meruit" or for "enhanced value" of the parcel of real estate formerly owned by the appellants.

2. Appellants contend that the Third Party Complaint should not have been dismissed for the reason that Rule 14 F.R.C.P. should have been held to have been applied to this case on the grounds that a third party defendant might be liable to either plaintiff or defendant and that this Rule should be liberally applied where there is no jurisdictional objection, in order to avoid unnecessary duplication of litigation.

3. Appellants respectfully submit that the contention of counsel for now appellees in the Court below to the effect that the Third Party Complaint should have been dismissed for the alleged reason that the now appellees merely happened to have some relationship with the transactions in question should not have furnished any basis for the dismissal of the Third Party Complaint in the Court below.

4. Appellants respectfully submit that a contention to the effect that Rule 14 F.R.C.P. applies to cases of insurors, guarantors, sureties, successive warrantors and the like is entirely too narrow a construction of the Rule.

5. Appellants contend that in the fact situation, as alleged in the pleadings in the Court below, the power to bring in now appellants as third party defendants was in the sound discretion of the Court and that the rendition of justice, in view of the allegations as to misrepresentation

and reliance upon same should have caused the Court below to have overruled the "Motion to Dismiss the Third Party Complaint."

6. Appellants contend that the fact that now appellants did not file a suit against now appellees should not have precluded the bringing in of appellees as third party defendants in the Court below.

7. Appellants respectfully submit that the combined inaccurate representations (made by the Vice President of plaintiff corporation and the Secretary of Appellee Corporation, and relied upon by Appellants) cause the impleading of now appellees to have been essential to the rendition of substantial justice by the Court below.

ARGUMENT

The case against now appellants, by Plaintiff Corporation in the Court below, is predicated upon the theories of law as set forth in the case of Polley v. Plainshun Corp., 186 N.Y.S. 2d 295. The Plaintiff Corporation contends that it is entitled to damages on the grounds of services allegedly rendered by the Vice President of Plaintiff Corporation for and in behalf of the now appellants, for which Plaintiff Corporation claims damages on a quantum meruit basis and for alleged "enhancement of value" of the parcel of real estate which was the subject of Eminent Domain proceedings which resulted in the settlement, as fully set forth in the "Statement of the Case, hereinabove.

Appellants contend that it is impossible, as a matter of simple arithmetic, for either of these contentions of Plaintiff Corporation to stand up against now appellants; but that if there is any claim by Plaintiff Corporation the same should be against now Appellee Corporations. Now Appellee Corporations based their "Motion to Dismiss the Third Party Complaint" upon several contentions in the Court below.

The first of these is a contention to the effect that a third party defendant can only be brought into a law suit, pursuant to Rule 14, F.R.C.P., where the third party defendant "is or may be liable to the

original defendant for all or a part of the plaintiff's claim against the original defendant." It is respectfully submitted that the Court below erred in applying too strict an interpretation of this contention for now appellees in the Court below. It has been held that Rule 14, F.R.C.P., will be liberally construed so that all claims arising out of the same occurrence may be disposed of in the same action. ROA v. Parking Associates Corporation, D.C. N.W. 1957, 20 F.R.D. 147; Blair v. Cleveland, 197 F.2d 842, 7th Circuit 1952; Dery v. Wyer, 265 F.2d 804, 2d Circuit, 1959.

Also, it has been held that Rule 14, F.R.C.P., permits bringing in of third party defendants on ground that said third party defendant might be liable to either plaintiff or defendant should be liberally applied in order to avoid unnecessary duplication of litigation where there is no jurisdictional objection. Dyke v. Sechrist, D.C. Md. 1957, 21 F.R.D. 240, Appeal Dismissed, 256 F.2d 881; Rosalis v. Universal Distributors, 21 F.R.D. 169.

Counsel for third party defendants, now appellees, contended in the Court below, that Rule 14, F.R.C.P. is not a device for bringing into an action any party which may happen to have some relationship to such controversy. It is respectfully submitted that the reliance of now appellants upon the inaccurate representation of the Secretary of Appellee Corporations takes this case far out of the category of cases in which a third party defendant merely happens to have some relationship with the controversy in question. The relationship of the Appellee Corporations is set forth in the "Statement of the Case" of this brief and is more fully alleged in the Complaint against Third Party Defendants (J.A. 7-9). It is respectfully submitted that the Court below erred in upholding the contention of now appellees to the effect that now appellees merely happened to have some relationship with the controversy in question. Counsel for the now appellees contended in the Court below that the third party practice provided by Rule 14, F.R.C.P. has its application in cases of insurers, guarantors, sureties, successive warrantors, and the like.

It is respectfully submitted that 3 Moore Federal Practice (2d ed.), pp. 409, 410 and 420, does not limit third party practice to cases of insurers, guarantors, sureties, successive warrantors, and the like. It is respectfully submitted that the Court below erred in upholding this contention for now appellees in dismissing the third party complaint filed in the Court below.

It is respectfully submitted that the Court below had great latitude in determining the question of whether or not now appellees should have been brought in as third party defendants, 3 Moore, p. 414. It is respectfully submitted that the allegations set forth in the "Complaint Against Third Party Defendants" (J.A. 7-9), clearly show a case in which the ends of justice require that now appellees should have been impleaded as third party defendants and that the Court below, in the interest of substantial justice, should have overruled the Third Party Defendant's Motion to Dismiss Third Party Complaint.

It appears to Counsel for now appellants that the Court below substantiated a contention of counsel for now appellees to the effect that since now appellants had not shown wherein now appellees were indebted to now appellants, the now appellees could not have been impleaded in the Court below as third party defendants. It is, of course, significant that both now appellants and now appellees entered into a stipulation with the Government of the United States (J.A. 9 and J.A. 27) whereby to settle the Eminent Domain case, of which the case at Bar is a collateral matter. It is true that counsel for now appellants has weighed possible defenses available to now appellees, since learning of the alleged misrepresentations, as set forth in the "Answer and Counter-Claim" (J.A. 10-15) and the "Complaint Against Third Party Defendants" (J.A. 7-9) filed herein and has come to the conclusion that counsel would not file suit in behalf of now appellants against now appellees. It is respectfully submitted, however, that since the case at Bar was filed after said Eminent Domain case had been settled, and since the case at Bar is based upon alleged benefits to now appellants, that a showing to

effect that now appellants have a chose in action against now appellees should not have been held to have been a condition precedent to impleading now appellees, as third party defendants, in the Court below.

One tremendously important factor in the case now on appeal is that a combination of the inaccurate statements of the Vice President of the Plaintiff Corporation and the Secretary of now Appellee Corporations, all of which said statements were relied upon by now Appellants, brought about the situation in which now Appellants were forced into a settlement of the Eminent Domain case which was unsatisfactory to Appellants. Having now Appellee Corporation as Third Party Defendants, in the trial of the case in the Court below, is not only essential to the rendition of substantial justice but also vital to the full and complete trial of the issues raised by Plaintiff Corporation in the Complaint for Debt for Services Rendered (J.A. 1-2) and Supplemental Complaint (J.A. 6) filed in the Court below. The purpose of Rule 14, F.R.C.P., is to avoid two actions which should be tried together and privity of contract is not required to exist between third-party plaintiff and third-party defendant in order to authorize a third-party complaint. Davis v. Associated Indemnity Corporation (Daniels, Third Party Defendant), 56 F. Supp. 541.

It is anticipated that counsel for Appellees will contend that the Order Dismissing the Complaint Against Third Party (J.A. 21-22) was not such a final action of the Court below as to be reviewable on appeal by this Honorable Court. If such a contention has merit, the parties to this litigation would necessarily (by reason of the inaccurate representations relied upon by Appellant as set forth hereinabove) be placed in a position in which, should there be any judgment in behalf of Plaintiffs against now Appellants in the Court below, now Appellants would be required to file a separate suit for the purpose of obtaining redress against now Appellees. It is respectfully submitted that such a procedure would cause Rule 14, F.R.C.P., to become a completely futile remedy. This also raises the question of whether or not, had counsel for appel-

lants not pursued this appeal, counsel for appellees could have contended that the Order Dismissing the Complaint Against Third Party entitled now appellees to the defense of res adjudicata. Moreno v. United States, 120 F. 2d 128, 1st Circuit, 1941, and Gartner v. Lombard Brothers, 197 F. 2d 53, 3d Circuit, 1952 are examples of cases in which the dismissal of Third Party Complaints have been held to have been reviewable final orders.

CONCLUSION

Now appellees enjoyed handsome enrichment in the Eminent Domain case by virtue of the activities of the Vice President of the Plaintiff Corporation in the Court below. A combination of the representations by the Secretary of Appellee Corporations and the Vice President of Plaintiff Corporation, in the Court below, brought about a situation in which if anyone is indebted to the Plaintiff Corporation, it should be Appellee Corporations. It is respectfully submitted that an interpretation of Rule 14, F.R.C.P., whereby now appellants were not permitted to implead now appellees, is far too narrow, is contrary to law, and so completely contrary to the accomplishment of the ends of justice, that this Honorable Court should reverse the decision of the Court below whereby the "Third Party Complaint was dismissed.

Respectfully submitted,

FORD E. YOUNG, Jr.
5540 Connecticut Avenue, N.W.
Washington, D. C.

Attorney for Appellants

INDEX

JOINT APPENDIX

[Filed February 1, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES L. DIXON & COMPANY a corporation 1144 Eighteenth Street, N. W. Washington, D. C., Plaintiff, vs. LOUIS J. COUREMBIS DOROTHY W. COUREMBIS both of Falls Road Potomac, Maryland, Defendants.	:	Civil Action No. 346-'62

COMPLAINT FOR DEBT FOR SERVICES RENDERED

1. The amount claimed herein exceeds the sum of $3,000.00.

2. Plaintiff, James L. Dixon & Company, a corporation, sues the defendants, Louis J. Courembis and Dorothy W. Courembis, his wife, to recover the sum of $11,500.00 for that the plaintiff, at the request of the defendants, did negotiate a certain written lease on or about April 8, 1959, wherein defendants were lessors and Independence Ave. Drugs, Inc., a corporation, was lessee, the same being on premises 101 to 107 Independence Avenue, S. E., and 202 to 206 First Street, S. E., in the District of Columbia, the same being known for purposes of assessment and taxation as Lot 882 in Square 732, together with improvements thereto.

3. That the lessee took possession of the demised premises on or about May 1, 1960, and plaintiff collected the monthly rental, as contemplated by the lease aforesaid, and received commission therefor, as stipulated by said lease, of 5% of the monthly rental of $2,083.33. That

thereafter, on or about December 21, 1960, the United States of America did file condemnation proceedings in District Court Docket No. 23--60 in this Honorable Court; that in said proceedings, the plaintiff United States of America did then file a declaration of taking title and deposited the sum which it estimated to be the fair market and reasonable value of said premises, whereupon defendants ceased to be entitled to continue to receive rental under the aforesaid lease, or plaintiff to collect the same on behalf of the defendants; but the defendants then became entitled to receive from the United States of America such sum as constitutes the fair market and reasonable value of said premises on said taking date.

4. That defendants and lessee stipulated with the United States of America, on or about November 22, 1961, that the full and just compensation for the condemned property was in the sum of $413,750, of which sum the lessee was to receive $67,500, and the balance to the defendants. That, by reason of negotiating said lease and assisting the defendants to improve the premises and otherwise, the plaintiff is justly entitled to receive the sum of $11,500.00 from the defendants; that the award of compensation in the condemnation proceedings was received by the defendants as a result of the value of the premises, as contributed to by the value of the tenancy negotiated and created by plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $11,500.00 plus interest at 6% per annum from December 21, 1960, and costs.

DONOHUE & KAUFMANN

By /s/ F. Joseph Donohue

Attorneys for Plaintiff
503 D Street, N. W.
Washington 1, D. C.
EXecutive 3-4440

[Filed March 14, 1962]

Motion To Dismiss
Complaint For Debt For Services Rendered

Come now the defendants, by and through their counsel, and respectfully move this Honorable Court to dismiss the "Complaint For Debt For Services Rendered" filed herein and for grounds of this Motion respectfully submit that the Complaint fails to state a cause of action upon which relief may be granted as more fully set forth in the Points and Authority in Support hereof.

/s/ Ford E. Young, Jr.

Attorney for Defendants
554 Connecticut Ave., N. W.
Washington, D. C.
EM 3-2438

[Filed March 14, 1962]

Points and Authorities in Support of Motion To Dismiss Complaint For Debt For Services Rendered

It is respectfully submitted that insofar as the "Complaint For Debt For Services Rendered" filed herein is a suit for loss of Real Estate Commissions, this case must necessarily fail on the grounds of impossibility of performance by reason of operation of law. The law is fundamental.

Grismore on "Contracts", 1947 edition Para. 174, Page 276.

"However, very often, the performance of a contract which is perfectly lawful and presumably capable of being performed at the time it is made, is prevented by a subsequent change in the law or by the manner of its administration. In such a case it is not correct to say that the contract is illegal. Nevertheless, it is generally held that, since the parties must be presumed to have made their contract with reference to the state of the law and its administration at the time, the contract is subject to the implied condition that the law shall continue to permit performance. Consequently if the law, or some agency acting under

authority of the law, later prevents or prohibits performance, the promisor is excused."

Williston and Thompson Students' Edition, published 1938 Para. 1938, page 911.

"Impossibility due to change of law.

It would obviously be a gross injustice if the law should hold a promisor liable for failing to perform the promised act after the law itself had prohibited its performance, though at the time of the contract the undertaking was legal; and it may be said broadly that where domestic law forbids or prevents the performance of a promise, legal when made, the promisor is freed from liability."

Corbin on "Contracts" Volume 6, Section 1346

Under heading "Impossibility" and Sub-heading "Prevention by Order or Decree of a Court of Administrative Officer", pages 348 and 349.

"Performance of a contract is sometimes prevented by a judicial order or decree forbidding such performance or by a judicial seizure of subject matter or of the means necessary to performance. Some cases have held that this kind of prevention is not a good excuse for non-performance. These holdings can be justified if the judicial action was brought about by reason of the defendant's default in performance of some other legal duty, or if the defendant could have prevented such judicial action by diligent effort."

(There surely could not be any basis for a contention to the effect that the defendants in the case at bar could have prevented the Government of the United States from taking the parcel of real estate in question so as to have gone on making payments to the plaintiff pursuant to defendant's lease with the Drug Fair Chain.)

12 American Jurisprudence Under heading "Contract," sub-heading "Performance or Breach", Sub-sub heading "Other Excuses for Non-performance".

Section 379 "Legal Prohibition" Page 955.

"Nonperformance is excused where performance is rendered impossible by the law. One of the conditions implied in a Contract is that

the promisor shall not be compelled to perform if performance is rendered impossible by an act of the law."

Counsel for plaintiff have interwoven a claim which appears to be on a quantum merit basis for allegedly "assisting the defendants to improve the premises and otherwise." While not admitting any indebtedness of defendants for any alleged assistance given to defendants by officers and/or agents of plaintiff corporation, it is respectfully submitted that, if counsel for plaintiff corporation desire to assert a claim on a quantum merit basis, same should be entirely separate and apart from the claim based upon loss of real estate commissions.

Respectfully submitted,
/s/ Ford E. Young, Jr.
Attorney for Defendants

* * *

[Certificate of Service]

[Filed March 20, 1962]

OPPOSITION TO MOTION TO DISMISS

Counsel for plaintiff respectfully submits to this Honorable Court that the argument of impossibility of performance is inapplicable to this case. The plaintiff rendered valuable services to the defendants; it leased property for the defendants to Drug Fair, a drug concern, for a period of many years; it also arranged for financing the project, for demolishing the old improvements and aided in planning construction of the new improvements. They sought and seek no remuneration for the many services so rendered, except as the same were reflected in the new lease, referred to in the complaint. Had the lease continued for its term, plaintiff would have received a commission of five percent (5%) of the rental paid, for the term and any renewal periods; had defendants desired, they could have paid plaintiff approximately one-half (1/2) of the commission, for the term of the lease, under custom in the trade.

The Federal Government filed a declaration of taking, thus bringing the lease to an end; plaintiff will show to the Court at the trial of this case,

that the value of said property in the condemnation case was fixed in large measure, due to the value established by the terms of the lease, obtained as above, by the plaintiff. This suit, being in the nature of quantum meruit, is only to recover the reasonable value for services rendered and received. The only case counsel has been able to find, directly in point, is clear and concise and in favor of the plaintiff's cause. Polley v. Plainshun Corp., 186 N.Y.S. 2d 295.

Plaintiff respectfully submits that the motion to dismiss should itself be dismissed.

DONOHUE, KAUFMANN & SHAW
By /s/ Joseph A. Kaufmann
* * *
Attorneys for Plaintiff

[Certificate of Service]

[Filed April 4, 1962]

SUPPLEMENTAL COMPLAINT

SECOND COUNT:

1. For the purposes of this count, the plaintiff adopts the allegations of paragraphs one (1) thru four (4) of the Complaint.

2. As alternative relief, plaintiff says that it is entitled to compensation from the defendants, based on the enhanced value of the real estate of the defendants, due to the leasing and other efforts of the plaintiff, in the sum of Eleven Thousand Five Hundred Dollars ($11,500.00), plus interest at six percentum per annum, from December 21, 1960.

DONOHUE, KAUFMANN & SHAW
By /s/ Joseph A. Kaufmann
* * *
Attorneys for Plaintiff

[Certificate of Service]

[Filed April 5, 1962]

MOTION TO BRING IN THIRD-PARTY DEFENDANTS

Defendants, by and through their counsel, move for leave to make Independence Avenue Drug Fair, Inc., a corporation and Drug Fair Community Drug Co., Inc., a corporation third-party defendants to this action and that there be served upon them summons and third-party complaint as set forth in Exhibit A hereto attached.

/s/ Ford E. Young, Jr.
Attorney for Defendants and
Cross-plaintiffs

* * *

[Filed April 6, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES L. DIXON AND COMPANY
a corporation
1144 Eighteenth Street, N. W.
Washington, D. C.

vs.

LOUIS J. COUREMBIS
DOROTHY W. COUREMBIS
both of Falls Road
Potomac, Maryland
Defendants and Third-Party Plaintiffs

and

INDEPENDENCE AVENUE DRUG FAIR, INC., a corporation successor to Independence Avenue Drugs, Inc., a corporation
and
DRUG FAIR - COMMUNITY DRUG CO., INC., a corporation (both)
Southeast Corner of 1st and Independence Avenue, S. E.
Washington, D. C.
Third-Party Defendants

Civil Action No. 346-62

COMPLAINT AGAINST THIRD-PARTY DEFENDANTS

Defendant and Third-Party Plaintiffs respectfully represent unto this Honorable Court as follows:

1. The jurisdiction of this Honorable Court is based upon Title 11, Section 306 of the Code of Laws For The District of Columbia and Rule 14 of the Federal Rules of Civil Procedure.

2. Third-party plaintiffs are the defendants in the Complaint For Debt and For Services Rendered and the Supplemental Complaint thereto filed herein.

3. Third-party defendants are the parent corporation which operates the Drug Fair chain of Drug Stores, namely Drug Fair Community Drug Company, Inc., and its subsidiary corporation, Independence Avenue Drug Fair, Inc., successor to Independence Avenue Drugs, Inc., which since on or about April 28, 1960 has operated a Drug Fair in the premises formerly owned by cross-plaintiffs located at 1st and Independence Avenue, S.E., this city.

4. In connection with the execution of the lease dated April 8, 1959 whereby the subsidiary cross-defendant corporation leased the premises located at 1st and Independence Avenue, S.E., this city, from cross-plaintiffs as former owners of said parcel of real estate, the Secretary of the cross-defendant corporations stated to the cross-plaintiff, Louis J. Courembis, who was then and there negotiating in his individual capacity and as the agent for his wife, Dorothy W. Courembis, the other cross-plaintiff hereto, that three and one half percent of the gross volume of business was the highest percentage of the gross volume of business that the parent corporation had ever allowed any of its subsidiary corporations to pay to a landlord, that said statement must have been known to said Secretary of cross-defendant corporations to be inaccurate; that said statement was material to the negotiations then and there in progress; that said Secretary of said cross-defendant corporations must have intended that cross-plaintiffs rely upon such statement; that cross-plaintiffs were without knowledge of the accuracy or inaccuracy of said statement; that in entering into the said lease cross-plaintiffs did rely upon such statement and had every right to have believed same to have been accurate; but that after negotiating and executing said lease and after spending

hundreds of hours of time of cross-plaintiffs in connection with the remodelling of the premises for a Drug Fair Store and after cross-plaintiffs had expended or become obligated for the sum of approximately One Hundred Thousand Dollars ($100,000.00) and after said subsidiary of said parent cross-defendant corporation had opened said Drug Fair for business, namely on or about April 28, 1960 and was conducting said business, the Government of the United States instituted Eminent Domain proceedings; that by reason of the provisions of aforementioned lease, the business prognosis of the officials of the cross-defendant corporations and other factors but primarily because said lease was for a ten year term with two additional privileges of renewal for additional like terms and because the parent cross-defendant corporation had established the annual value of comparable stores at from five to six percent of the gross volume of rental, the cross-defendants came into a very favorable bargaining position (when comparing the reserved rental with the potential annual value of the parcel of real estate); that it was the cross-defendants who benefited from the lease in question in that they received the sum of Sixty-seven Thousand Five Hundred Dollars ($67,500.00) from the final settlement with the United States Government; and that, while denying any liability to the plaintiff corporation herein, such damages as said plaintiff corporation may be able to prove for services rendered and/or for enhancing the value of the parcel of real estate were rendered for the benefit of cross-defendant corporations and cross-defendant corporations did, in fact, benefit from said lease and were the only legal entity which did so benefit.

Wherefore, the premises considered, cross-plaintiffs pray that any sum which plaintiffs can prove by way of damages shall be assessed against cross-defendants, together with costs.

/s/ Ford E. Young, Jr.
Attorney for cross-plaintiffs

* * *

[Filed April 6, 1962]

ANSWER AND COUNTER-CLAIM

ANSWER

Defendants respectfully submit the following as their answer to the "Complaint For Debt For Services Rendered" filed herein:

1. Although denying that plaintiff has any claim against defendants, defendants do not challenge the jurisdiction of this Honorable Court.

2. Although denying that plaintiff has any claim against defendants, defendants admit that plaintiff corporation, by and through its duly constituted officers, representatives and/or employees served as the real estate brokers in connection with the execution of the lease as set forth in the paragraph numbered 2 of plaintiff's complaint.

3. Defendants admit all of the allegations of the paragraph numbered 3 in plaintiff's complaint contained, excepting the last clause thereof which does not include any statement as to the interest of Drug Fair Community Drug Company, Inc., a Maryland corporation and its subsidiary Independence Avenue Drug Fair, Inc., a Maryland corporation, successor corporation to Independence Avenue Drugs, Inc., a District of Columbia corporation as the tenant pursuant to the lease described in the paragraph numbered 2 of plaintiff's complaint.

4. Defendants admit the allegations of the first sentence of the paragraph numbered 4 in plaintiff's complaint contained and deny all other allegations contained in said paragraph.

5. Defendants deny that they are indebted to plaintiffs in any sum whatsoever.

Defendants respectfully submit the following for answer to the Supplemental Complaint filed herein:

1. Defendants deny that plaintiff corporation by and through its officers, representatives and/or employees enhanced the value of the parcel of real estate in question and deny that plaintiffs are entitled to any compensation for alleged enhancement of value as in plaintiffs' "Supplemental Complaint" alleged.

Further answering the Complaint and Supplemental Complaint filed herein, defendants respectfully submit unto this Honorable Court as follows:

1. That a Vice President of plaintiff corporation handled the negotiations for plaintiff corporation as a Real Estate Broker which resulted in the execution of the lease referred to in the paragraph numbered 2 in plaintiff's Complaint For Debt For Services Rendered; that said Vice President of plaintiff corporation had negotiated other leases for the parent corporation which operates the Drug Fair chain of stores, namely, Drug Fair Community Drug Co., Inc., a Maryland corporation and was familiar with the percentages of the gross volume of business which the said chain Drug Company and/or its subsidiaries paid for the rental of other stores, namely from five to six percent of the gross volume of business in said other stores; that said Vice President of plaintiff corporation overheard the Secretary of the Drug Fair Community Drug Company, Inc., inform the defendant, Louis J. Courembis that three and one half percent of the gross volume of business would become the highest rental that said Drug chain would be paying in any store, in connection with the execution of said lease; that said Vice President of the plaintiff corporation informed both defendants that the proposed lease was the best that said Drug Chain would enter into; that said representation was made to induce the defendants to enter into said lease; that defendants relied upon such statements by said Vice President of plaintiff corporation; that the defendants believed that said Vice President of plaintiff corporation was then and there serving the best interest of defendants and that defendants had a right to rely upon his said statements; that by so relying upon such statements as aforesaid, defendants proceeded to execute and to become bound by the said lease and to remodel said premises for a Drug Fair; they by reason of defendants entering into said lease at only three and one half percent of the gross volume of business (plus a guaranteed rental of at least Twenty-five Thousand Dollars ($25,000.00) per year), the said Drug chain and its subsidiary were

placed in so favorable a position as to have enabled them to realize a recovery of Sixty Seven Thousand Five Hundred Dollars (67,500.00) out of the fee or total valuation of the parcel of real estate in question in the Eminent Domain Case numbered 23-60 in this Honorable Court, said parcel of real estate having been owned in fee simple by defendants when said Eminent Domain case was instituted; and that said Vice President of plaintiff corporation must have known that the Drug Fair chain had paid more than 3 1/2 percent of the gross volume of business to other landlords and would have paid a higher percentage to defendants in the lease in question.

2. That the plaintiff corporation, by and through its officers, representatives and employees failed to comply with its obligations to defendants in that the lease in question did not include a provision for the purpose of protecting the interests of plaintiffs in the event of condemnation of the parcel of real estate in question by the United States Government.

3. That, although denying any obligation for services rendered by plaintiff corporation or for any enhancement of the value of the parcel of real estate in question by plaintiff corporation, plaintiff corporation has been paid for any elements of damages against defendants which it can prove by the percentage of rent collected from May of 1960 through January of 1961 by plaintiff corporation.

Wherefore the premises considered defendants respectfully pray that the Complaint and Supplemental Complaint filed herein by plaintiff corporation be dismissed with costs assessed against plaintiff corporation.

/s/ Ford E. Young, Jr.
Attorney for Defendants

* * *

COUNTER-CLAIM

1. The jurisdiction of this Honorable Court is based upon Title 11, Section 306 of the Code of Laws For the District of Columbia, 1951 Edition, as amended and Rule 13 of the Federal Rules of Civil Procedure.

2. In connection with the execution of the lease between cross-plaintiffs, Louis J. Courembis and a subsidiary of the Drug Fair chain,

namely Independence Avenue Drugs, Inc., a District of Columbia corporation, a Vice President of James L. Dixon and Company, a corporation, cross-defendant handled the negotiations for cross-defendant as real estate broker and said negotiations resulted in a lease dated April 8, 1959 between cross-plaintiffs as landlords and the said Independence Avenue Drugs, Inc., a District of Columbia corporation by the terms of which, interalia, the said tenant was to rent the premises in question when same had been completely remodelled for a Drug Fair for a period of ten years with privilege of renewal for a period of ten years and with additional privilege of renewal for an additional ten years for a guaranteed rental of at least Twenty-five Thousand Dollars ($25,000.00) per year and with an additional provision to the effect that when three and one-half percent of the gross volume of business would exceed said guaranteed rental the cross-plaintiffs, as landlords, would also receive the difference; that the said Vice President of cross-defendant corporation had negotiated other leases for the parent corporation which operates the Drug Fair chain of stores, namely, Drug Fair Community Drug Company, Inc., a Maryland corporation and was familiar with the percentage of the gross volume of business which the said chain drug company and/or its subsidiaries paid for the rental of other stores, namely from five to six percent of the gross volume of business in said other stores; that said Vice President of cross-defendant corporation overheard the Secretary of the Drug Fair Community Drug Company, Inc., inform the cross-plaintiff, Louis J. Courembis that three and one half percent of the gross volume of business would become the highest rental that said Drug chain would be paying in any store, in connection with the execution of said lease; that said Vice President of the cross-defendant corporation informed both cross-plaintiffs that the proposed lease was the best that said Drug chain would enter into; that said representation was made to induce the cross-plaintiffs to enter into said lease; that cross-plaintiffs relied upon such statements of said Vice President of cross-defendant corporation who was then and there acting and speaking in his official

capacity as the officer, representative and/or agent of the cross-defendant corporation; that the cross-plaintiffs believed that said Vice President of plaintiff corporation was then and there serving the best interests of cross-plaintiffs and that cross-plaintiffs had a right to rely upon his said statements; that by relying upon such statements, as aforesaid, cross-plaintiffs proceeded to execute and to become bound by the said lease whereupon cross-plaintiffs proceeded with the remodelling of the buildings on the parcel of real estate in question for a Drug Fair Store; that said remodelling process took more than a year during which both cross-plaintiffs spent hundreds of hours of their time in connection with problems which arose and spent or incurred liability for approximately the sum of One Hundred Thousand Dollars ($100,000.00); that the said Drug Fair Store opened, for business on or about April 28, 1960; that the Government of the United States instituted Eminent Domain proceeding on or about August 8, 1960; that as the trial of said Eminent Domain case approached the facts that the market as to annual value of comparable stores had been established by the Drug Fair chain at from 5 to 6 percent of the gross volume of business while the lease which the Vice President of cross-defendant had induced cross-plaintiffs to enter into and execute provided for only three and one half percent of the gross volume coupled with the business prognosis for the store in question and other related factors placed the Drug Fair chain in such a favorable position as to allow said Drug chain to obtain the sum of Sixty-seven Thousand Five Hundred Dollars ($67,500.00) out of the total fee or total value of the parcel of real estate heretofore owned by cross-plaintiffs; that had it not been for the reliance of cross-plaintiffs upon the statements made by the Secretary of the Drug Fair Community Drug Company, Inc., and the Vice President of cross-defendant and ensuing events as set forth hereinabove, cross-plaintiffs would have realized and been compensated the sum of Sixty-seven Thousand Five Hundred Dollars ($67,500.00) more than they received from the settlement of said Eminent Domain case, taking into consideration the liabilities and expenses that cross-plaintiffs incurred

and all proper factors in the final accounting whereby The Real Estate Title Insurance Company and The Columbia Title Insurance Corporation, both of the District of Columbia, finally settled all claims involved in said Eminent Domain case and made distribution accordingly on or about February 9, 1962; and that said Vice President of cross-defendant corporation must have known that the Drug Fair chain had paid more than 3 1/2 percent of the gross volume of business to other landlords and would have paid a higher percentage to defendants in the lease in question.

Wherefore cross-plaintiffs demand judgment against cross-defendant corporation in the sum of Sixty-seven Thousand Five Hundred Dollars ($67,500.00) plus interest at 6% per annum from February 9, 1962 and costs.

/s/ Ford E. Young, Jr.
Attorney for Cross-plaintiff

* * *

[Certificate of Service]

[Filed April 30, 1962]

THIRD-PARTY DEFENDANTS' MOTION TO DISMISS THIRD-PARTY COMPLAINT

Third-party Defendants herein, Independence Avenue Drug Fair, Inc., and Drug Fair-Community Drug Co., Inc., hereby move the Court to dismiss the Third-party Complaint against them, on the ground that the Third-party Complaint does not state a claim in respect of which the Third-party Defendants are or may be liable to the Third-party Plaintiffs for all or part of the Original Plaintiff's claim against them, as required by Rule 14, Federal Rules of Civil Procedure. The grounds for this Motion more fully appear in the attached Memorandum of Points and Authorities.

Respectfully submitted,

/s/ Norman Diamond
/s/ Dennis G. Lyons

Arnold, Fortas & Porter

* * * *

[Certificate of Service]

Attorneys for Third-party Defendants

[Filed April 30, 1962]

THIRD PARTY DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THIRD-PARTY COMPLAINT

1. This is a suit by a real estate broker (the Dixon Company — Plaintiff) for fees or other compensation for its services, rendered to the broker's principal, a landlord (Louis Courembis, et ux. — Defendants), in connection with the remodeling and leasing of certain premises to a tenant, a "Drug Fair" store. A few months after the lease commenced to run, the premises were taken by the United States, pursuant to the power of eminent domain, and the Landlord and the Tenant, in a negotiated settlement with the United States, each received compensation for their property interests taken. The real estate Broker, Plaintiff in this lawsuit, complains that notwithstanding the condemnation — which cut short the monthly payment of rent and the 5% commission on the monthly rentals which the Broker was receiving from the Landlord — the Broker was entitled to further compensation for its services. The Landlord (Defendants) filed a Motion to Dismiss which was denied by Judge Curran in open court on March 28, 1962. The Landlord has filed an Answer denying any indebtedness to the real estate Broker, and has alleged in defense to the Broker's claim that the Broker was in various respects negligent and derelict in handling the Landlord's affairs. These latter allegations were also the basis of a Counter-claim of the Landlord against the Broker filed at the same time as the Answer.

2. Purporting to make use of the procedures set forth in Rule 14, Federal Rules of Civil Procedure, relating to Third-party Practice, the Defendant Landlord has brought in the Tenant (the two Drug Fair corporations), as Third-party Defendants. As defined in Rule 14, the only legal basis for involving a third party in a lawsuit under the Federal Rules, by reason of Rule 14, is that the third party: "is or may be liable to him [the original defendant] for all or part of the plaintiff's claim against him." As Professor Moore points out, impleader under Rule 14 "is not permissible unless these conditions are complied with; it is not

a device for bringing into an action any controversy which may happen to have some relationship with it." 3 Moore, Federal Practice (2d ed.) p. 413. See also, id., pp. 418-19.

3. Accordingly, unless the Third-party Complaint states a claim or cause of action in respect to which the Tenant might be liable to the Landlord for all or part of the Broker's claim against the Landlord, no "third-party cause of action" under Rule 14 is stated, and the Third-party Complaint is prone to a Motion to Dismiss.

4. A reading of the Third-party Complaint makes it plain that on its face the Third-party Complaint neither specifies nor suggests any basis on which Tenant might be liable to the Landlord in respect of the claim for which the Landlord may be liable to the Broker:

a. The Third-party Complaint contains suggestions of overreaching by the Tenant with respect to the Landlord. Taking these allegations as true for the purposes of this motion, such allegations might in some contexts create a general liability of the Tenant to the Landlord;[1/] but these allegations do not suggest any basis under which Tenant may be liable to the Landlord in respect of the Broker's claim against the Landlord. Such allegations do not, obviously, even if true, make Tenant, the other party to the real estate transaction, an indemnitor of a real estate Broker's claim against his principal. Unless the claim of the Landlord is one for reimbursement or indemnity in respect of the Broker's claim against him, it cannot be raised against the Tenant under Rule 14 in this proceeding. See 3 Moore, pp. 413, 418-19, supra.

b. The Landlord also claims that the real estate Broker's services enriched the Tenant rather than the Landlord. At the most, these allegations might be a basis for a claim, albeit a very far-fetched one, of the Broker against the Tenant; but certainly these allegations supply no basis on which the Landlord would be entitled to reimbursement by the

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[1/] Though hardly here where the Landlord and Tenant have already entered into a negotiated settlement of the matters in question.

Tenant for any sums the Landlord may have to pay the Broker — the test of Rule 14.[2/]

c. At the most, the allegations of the Third-party Complaint say that the Broker was unfaithful in its duty to the Landlord and served the Tenant rather than the Landlord. Such an allegation might well be the basis (as it is in the Landlord's Answer) for a denial of compensation due from the Landlord to the Broker. (See Restatement, Agency 2d, § 387). If the Broker committed any breach of duty to the Landlord, the Landlord may have a defense against the Broker's claim and possibly a Counter-claim against him (it should be noted that both the defense and the Counter-claim have been in fact asserted); but these allegations do not supply any basis whereby the Landlord may claim that the other party to the transaction, the Tenant, should reimburse him for moneys which he may owe the Broker. Rather, these allegations, if established, may simply lead to a conclusion that the Landlord does not owe the Broker anything.

5. As the authorities make clear (see 3 Moore, pp. 409-10, 420), the "Third-party Practice" provided by Rule 14 has its application in cases of insurers, guarantors, sureties, successive warrantors, and the like. It is designed to cover cases where there is a third party liable to indemnify the Defendant, or to make reimbursement to him, in respect of the moneys he may owe the Plaintiff. Obviously, there has been no basis stated here on which, as a legal matter, the Tenant would be obligated to reimburse or indemnify the Landlord with respect to moneys he might owe the Broker. At most, the Third-party Complaint's allegations suggest (a) grievances of the Landlord against the Tenant, not related to any question of reimbursement or indemnification of the Landlord in respect to the Broker's claim against him; or (b) to matters which are strictly matters of defense or counterclaim between the Landlord and the Broker.

[2/] Originally, Rule 14 permitted the original Defendant to bring in a third party simply on the basis that the third party "is or may be liable . . . to the plaintiff for all or part of the plaintiff's claim against him [the defendant]." See 3 Moore, p. 403. This provision was specifically deleted in 1946. See Advisory Committee note, reproduced at 3 Moore, pp. 405-06.

In short, while possibly those associated with the Tenant may be potential witnesses in the controversy between the Broker and the Landlord, there is absolutely no claim stated in the Third-party Complaint on which, under Rule 14, the Tenant should be a party to this lawsuit between the Broker and the Landlord.

Conclusion

For the reasons stated, the Third-party Complaint should be dismissed.

Respectfully submitted,

/s/ Norman Diamond

/s/ Dennis G. Lyons

Arnold, Fortas & Porter

* * *

Attorneys for Third-party Defendants

[Filed May 10, 1962]

POINTS AND AUTHORITIES IN OPPOSITION TO THIRD-PARTY DEFENDANTS' MOTION TO DISMISS THIRD-PARTY COMPLAINT.

It is respectfully submitted that the argument of counsel for third-party defendants should fail for the reason that, in the case at bar, the third-party defendants should be held to be liable to defendants and third-party plaintiffs for any and all damages which plaintiffs may be able to prove against defendants.

The fact of a misrepresentation which was relied upon, as alleged in the Complaint Against Third Party Defendants, does not, it is respectfully submitted, bring this case within that category of cases in which the third-party defendants merely happened to have some relationship with the transactions in question. 3 Moore Federal Practice (2d ed) Page 413.

Most certainly there is enough to cause this Motion To Dismiss to be overruled by the language of Rule 14, F.R.C.P., "who is or may be liable" to defendants.

One claim for damages by plaintiff is based upon "quantum meruit"

for services allegedly rendered by plaintiff for and in behalf of defendants. With regard to this contention by plaintiff the question of whether defendants or third-party defendants benefited from such services (if proven) goes to the heart of the case at bar.

The other claim for damages by plaintiff (as set forth in the Supplemental Complaint filed herein) is for alleged "enhanced value" of the real estate formerly owned by the defendants, due to the leasing and other efforts of the plaintiff.Counsel for defendants and third-party plaintiffs proposes to prove by simple arithmetic, at the trial of this case, that such a claim just cannot stand up against defendants. On the other hand, any enhancement of the real estate which can be proven inured to the benefit of the third-party defendants who made such a handsome settlement in the Eminent Domain case as set forth in the "Complaint Against Third-Party Defendants."

It has been held that Rule 14, F.R.C.P. will be liberally construed so that all claims arising out of the same occurrence may be disposed of in the same action.

ROA v. Parking Associates Corp., D.C. N.Y. 1957, 20 F.R.D. 147.

Also, it has been held that Rule 14, F.R.C.P. permits bringing in of third-party defendant on ground that said third-party defendant might be liable to either plaintiff or defendant should be liberally applied in order to avoid unnecessary duplication of litigation where there is no jurisdictional objection.

Dyke v. Sechrist, D.C. Md. 1957, 21 F.R.D. 240,
Appeal dismissed 25b F.2d 881.

It is respectfully submitted that 3 Moore, pages 409, 410 and 420 does not establish a principle to the effect that Rule 14, F.R.C.P. applies only in cases of insurers, guarantors, sureties, successive warrantors, and the like.

It appears to counsel for defendants and third-party plaintiffs that counsel for third-party defendants are attempting to argue that since there is no suit by third-party plaintiffs against third-party defendants, based upon the misrepresentation as set forth in the "Complaint Against

Third-Party Defendants," the same cannot become the basis whereby third-party plaintiffs can shift any liability which plaintiffs may be able to prove against third-party plaintiffs, as defendants, to the third-party defendants. It is not incumbent upon counsel for third-party plaintiffs to state the reasons why such a suit has not been filed. It is a matter of record that both third-party plaintiffs and third-party defendants entered into a stipulation whereby to settle the Eminent Domain Case in question with the Government of the United States. This suit was filed after said Eminent Domain Case had been settled. This suit is based upon alleged benefits to defendants and third-party plaintiffs. If there were any benefits; if anyone gained anything from the work of the Vice President of Plaintiff Corporation; if there is any legal basis for anyone to compensate the plaintiff corporation in any sum or manner whatsoever, then the parties which should do so are the third-party defendant corporations which have enjoyed such handsome enrichment as a result of the Eminent Domain Case in question, they having been placed in such a favorable position, as is set forth in the Complaint Against Third-Party Defendants.

It is respectfully submitted that "whether a party to an action shall be allowed to implead an additional party rests in the sound discretion of the Court," 3 Moore page 414; and that on the basis of allegations set forth in the "Complaint Against Third-Party Defendants" the Motion To Dismiss said complaint should be denied.

/s/ Ford E. Young, Jr.
Attorney for Defendants and
Third-Party Plaintiffs

[Certificate of Service]

[Filed June 5, 1962]

ORDER
[Dismissing Third-Party Complaint]

Upon consideration of Third-party Defendants' Motion to Dismiss Third-party Complaint, and upon consideration of the Memoranda of Points and Authorities in support of and in opposition to the same, and

the arguments of counsel thereon, and the Court being duly advised in the premises, it is hereby ordered that Third-party Defendants' Motion to Dismiss Third-party Complaint is hereby granted, and the Third-party Complaint herein is hereby dismissed.

/s/ Edward A. Tamm
United States District Judge

[Filed June 11, 1962]

NOTICE OF APPEAL

Notice is hereby given this 11th day of June, 1962, that Louis J. Courembis and Dorothy W. Courembis, defendants and Third Party Plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 5 day of June, 1962 in favor of Independence Avenue Drug Fair, Inc., a corporation and Drug Fair Community Drug Co., Inc., a corporation, third party defendants against said Louis J. Courembis and Dorothy W. Courembis, defendants and third party Plaintiffs, by order dismissing the third party complaint filed herein.

/s/ Ford E. Young, Jr.
Attorney for Defendants and
Third Party Plaintiffs

* * *

TRANSCRIPT OF HEARING ON MOTION

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Washington, D. C.

Tuesday, June 5, 1962

The above-entitled matter came on for hearing on motion of Third-party Defendants to dismiss before The Honorable Edward A. Tamm, Judge, United States District Court for the District of Columbia.

APPEARANCES:

FORD E. YOUNG, JR., Esq.,
For Defendants and Third-party Plaintiffs

DENNIS G. LYONS, Esq.,
For Third-party Defendants

3 PROCEEDINGS

THE DEPUTY CLERK: No. 8, James L. Dixon & Company versus Courembis, et al.

ARGUMENT IN SUPPORT OF MOTION BY MR. LYONS

MR. LYONS: May it please the Court, I represent the Third-Party Defendants in this action. Your Honor, this is an action by a real estate broker against the landlord, who was the broker's client, for commissions and certain other items of compensation in connection with the letting of certain premises which have subsequently been taken by the United States under the power of eminent domain.

THE COURT: Why should the Third-Party complaint be dismissed?

MR. LYONS: Because it does not meet the test set forth in Rule 14. The test of Rule 14 is that the summons and complaint may be served upon a person not a party to the action who is or may be liable to him — 'him' meaning the original defendant — for all or part of the plaintiff's claim against him.

Now, from the Third-Party complaint that was filed and served in this action, Your Honor, we contend that it was clear that the Third-Party Plaintiff, the original defendant, is not asserting any particular in respect of which the Third-Party Defendants, the tenants, would be liable

4 over to the original defendant for the plaintiff's claim against the original defendants. Instead all of what the Third-Party complaint primarily amounts to is a claim that the original plaintiff should have sued the Third-Party defendants in addition to or in lieu of the original defendants.

Now, that sort of contention might have had some basis under the original form of Rule 14 before it was amended by the Rules Committee and by the Supreme Court in 1946 when you were allowed to bring in a person who was or might be liable to you, the original defendant or to the original plaintiff; but in 1946, that rule was changed and the only category of persons that the rule now speaks of are persons who you are claiming are liable to you if you are liable to the original plaintiff.

The classic example is a, I suppose, surety who is sued by the creditor and claims that the principal debtor would be liable to him, the surety, if the surety has to pay the original creditor's claim.

This is not that sort of claim. It is obvious that there is no duty of indemnification upon the other party to a real estate transaction to make good to the client of the broker any sums which the broker's client has to pay to the broker. What the claim is here is that evidently in

5 some respects the original defendants here, the landlord, believes that the broker's efforts if they enriched anyone enriched the other party to the transaction.

At the most that would probably amount to a defense to the original claim that the broker was disloyal; it might give rise to a counter-claim—and both of these already have been asserted by the defendants. But we submit there is no basis whereby that makes the other party to the transaction a principal debtor, an insurer, if you will, for the broker's claim against his client.

Now, the only other flavor that I get from reading the Third-party complaint, Your Honor, is that there are some general allegations of misrepresentation and overreaching on the part of our client, the tenant, which are complained of by the landlord. Now, I am not sure that these are being pressed but even if they are, it is perfectly clear from the fact of the Third-Party complaint that these have nothing to do with making the Third-Party defendant liable in respect of the plaintiff's initial claim in the action.

These might if they are pressed — and they have not been in any independent action — these might be the sort of claims that would give rise to an independent lawsuit, but they have nothing to do with making the Third-Party defendant answerable and indemnify the original defend-

6 ants in respect of the plaintiff's claims.

The Rule, the authorities make clear, has its principal application in cases of insurers, persons who are in the legal relationship of an indemnitor to the original defendant or whom the original defendant claims

is in the relationship of indemnitor. But it is perfectly clear, we submit, from the face of the Third-Party complaint here that there are not any facts alleged that would furnish the basis for a legal claim that the tenant is an indemnitor of the claims which the broker is asserting against his client, the landlord.

Now, the principal case which the landlord relies on is the case of ROA versus Parking Associates Corp., which he cites on page 2 of his memorandum. In that case, the original defendant did claim that the Third-Party defendant was an indemnitor in respect of the plaintiff's claim against the original defendant and, of course, the Court, on the basis of that allegation and the facts which tended to support it, allowed the Third-Party defendant to stay in.

The other basis on which the landlord urges that the tenant who is a stranger, we submit, to this claim between the broker and the landlord should be kept in is that decisions under Rule 14 lie within the discretion of the Court. But we submit the authorities make it plain that that authority is one to be exercised only when you start with a claim which meets the terms of the Rule, that is so say, the Court need not force every Third-Party defendant to remain joined just because the Rule literally applies.

For example, insurance companies are never, in most jurisdictions, permitted to be joined as Third-Parties in a jury action even though they are clearly indemnitors of the defendant.

There is, we submit, no discretion to enlarge the clear words of the Rule particularly in the light of the explicit amendment which was made in 1946 changing the prior practice, making it clear that only where there are facts alleged which would make the Third-Party defendants liable to indemnify the original defendant in respect of the plaintiff's claim, is there a basis for a joinder under Rule 14.

Thank you.

ARGUMENT IN OPPOSITION TO MOTION BY MR. YOUNG

MR. YOUNG: Good morning, Your Honor. I would like to have the record show I am Ford Young.

May it please Your Honor, the fact situation is tremendously important and since this was an eminent domain case which was handled by Judge Hart, I think that in connection with this motion that Your Honor should have a statement as to the background facts.

8 In the spring of 1959, there were negotiations looking towards the remodeling of a parcel of real estate at First and Independence Avenue, Southeast. At that time, the question which was presented to my clients who are Louis J. Courembis and his wife Dorothy was whether or not they would remodel this parcel of real estate for a Drug Fair store or whether they would attempt to sell it.

They negotiated with the Dixon Company as the real estate broker and with the secretary of Drug Fair. They had to have a guaranteed rental of $25,000 a year in order to undertake the remodeling and in connection with these negotiations, Drug Fair agreed to the $25,000 a year as a guaranteed rental and Drug Fair agreed to 3-1/2 per cent of the gross volume so that when 3-1/2 per cent of the gross volume exceeded $25,000, under the terms of the lease, the Courembis family were to receive the difference also: In the meantime, a guaranteed $25,000 lease and the lease was to run for a term of ten years with renewal for ten years, and then renewal for an additional ten years.

In connection with those agreements or those negotiations, the secretary of Drug Fair informed Mr. Louis Courembis, acting for himself and as agent for his wife, that 3-1/2 per cent was the highest rental which Drug Fair gave anywhere. The vice-president of the plaintiff

9 corporation, the Dixon company, overheard the statement and said nothing.

Relying on that statement, the Courembis family entered into the lease. They became obligated for $100,000. They put in their time and during the course of the year between April 1959 and April 1960, the premises were completely remodeled for a Drug Fair.

In August of 1960, the eminent domain cause was filed pursuant to an act of Congress which was passed a few months prior thereto. So that we came to the neatest question, I believe, that we have ever had here in this jurisdiction on an eminent domain case of a tenant who was in the very healthy position of giving 5 to 6 per cent in comparable stores and having a business prognosis which showed that the volume of business within five to six years would be up over a million dollars. Drug Fair was in a bargaining position because of the test of the law which is that the tenant's right in an eminent domain case is based upon a comparison of the reserve rental with the annual value of the land.

So that we finally settled with the government; not with each other, incidentally, Your Honor. The stipulation of settlement does not provide a settlement between Drug Fair and Courembis but each in the stipula-

10 tion — which is the normal form used by the United States Attorney's office — settled with the Government of the United States whereby the Courembis family received $346,250 and Drug Fair received $67,500.

Now after all of that, the Dixon company came in and filed this suit claiming $11,500 and they base their claim on a New York case Raymond F. Polley, and others, versus the Plainshun Corporation which is cited as 186 New York Supplement 2d 295.

I filed a motion to dismiss and the motion came on for hearing before Judge Curran and at that time, Judge Curran ruled that under this New York case, the motion to dismiss would be overruled.

Under the Polley versus Plainshun Corporation case, the broker has a right to recover on one of two bases: The first basis would be that the broker rendered services on a quantum meruit basis for which the owner received the benefit. The second basis would be that due to the activities of the broker, the property was enhanced in value in such a manner as to have caused the owner to have received the benefit.

Now, if there was any benefit at all in the case at Bar, the benefit was not to the owner because if you take the value of the real estate as it existed before Courembis entered into this lease and add $100,000 which

he spent to remodel, that sum would exceed the amount that Courembis received. It's a mathematical certainty that the real estate broker didn't do anything which enured to the benefit of Courembis; what he did —

THE COURT: The problem before the Court this morning is a rather narrow one, that is, as to the right of your defendants to have a Third-Party action. That is all that is before the Court.

Why do you say that you are entitled to maintain a Third-Party action in this case?

MR. YOUNG: Yes, Your Honor. I thought Your Honor should have that background before we get into that.

I think if we get right to the heart of it, in Barron and Holtzoff — and while I did not quote this in my brief, I am sure that my learned opponent has read all of the authorities and is familiar with this — I am reading from Barron and Holtzoff 1A, Sections 241 to 480, page 653:

> "The basic theory which underlies this conclusion is that the word 'claim' as used in the rules has a broader connotation than that which the old law gave to 'cause of action,' and denotes the aggregate of operative facts which give rise to a right enforceable in the courts. The same aggregate or core of facts may give rise not only to rights in the plaintiff against the defendant but also to rights in the defendant against third parties, and the rule permits determination in a single action of such rights."

Now, where my learned opponent and I are in disagreement is that he contends that I must show a cause of action against Drug Fair or this motion should prevail. My position is that under the Rule and under the cases which I have cited in my brief which he has referred to this morning, if we have a claim against the Third-Party defendant that that claim should be litigated in the original action.

There is also law, may it please Your Honor, that if this motion

should be granted that we could turn around and file a counter-claim under Rule 13(h) and for that reason this motion should be denied to avoid circuity of action.

There are defenses, if it please Your Honor, assuming that we would sue Drug Fair in this action. We have not tried to sue Drug Fair actively; we have just tried to bring them in on the ground that certainly if any money is owed the Dixon company by anybody, it's Drug Fair who owes the money because it's Drug Fair who has benefited.

But if we would attempt to sue Drug Fair — We have a cause of action against Drug Fair all right but we recognize the fact that Drug Fair might well have defenses to the action. I weighed that matter very

13 carefully as to whether or not I would actually bring a case against Drug Fair in behalf of the Courembis family and I came to the conclusion that if I would do so, there would well be defenses, defenses of waiver, defenses of estoppel and defenses of accord and satisfaction which I am sure my learned opponent would spring to to bring to front.

The fact that they would have defenses to an action which I might bring against them does not keep them from liability to be brought in to answer for their part or for all of any recovery which could possibly be obtained by the Dixon company and, more particularly, in view of the fact that the Dixon company bases its claim on quantum meruit and enhancement of the value; and if anybody benefited from that, it was Drug Fair and not the defendants.

Now, if Your Honor would want me to go into these cases, I would like to do so.

Mr. Lyons refers to the ROA v. Parking Associates Corporation and The Port of New York Authority. That action was an action for personal injuries and the parking lot wanted to bring in the New York Port Authority, United Airlines and Trans-World Airlines on the ground that they were responsible for this parking lot where the accident happened. United and Trans-World base their attack on the Third-Party complaint

14 on two grounds: first, the Third-Party plaintiff denies any negligence on its part and claims that it cannot be held liable since the

conditions which caused the plaintiff's injuries were created by the Third-Party defendants New York and Port Authority. Now, that's the Airlines claiming that the Port Authorities were the ones that were responsible and not themselves said that they had merely the duty of inspecting, maintaining and cleaning the premises at the parking lot and they could be only secondarily or passive wrongdoers while the Port Authorities were the active wrongdoers and, therefore, United and Trans-World Airlines contended they should not be impleaded.

Here is what the Court said: "I disagree. The third-party complaint alleges that Trans-World and United had the duty of maintaining, inspecting and cleaning the lot in question. The language is sufficiently broad to impose liability upon them if the facts should warrant it."

And here is the crux of my reason for bringing in this case:

"Rule 14(a) of the Federal Rules of Civil Procedure should be liberally construed, so that all claims arising out of the same occurrence may be disposed of in the same action."

15 Now, the complicated factor here is the difference between "claims" and "causes of action", and that is why I thought it was so important to give Your Honor this background material so that Your Honor will see that if there is any claim by the Dixon company against Courembis, it is also a claim against Drug Fair. And although Courembis may have a cause of action to which there would be defenses, Courembis still has a claim against Drug Fair and that is why I think the distinction brought out in Barron and Holtzoff is so important.

Mr. Lyons is right when he says that in the case of Dyke versus Sechrist the motion to dismiss the third-party complaint was granted; but in that case, the United States District Court for the District of Maryland, District Judge Chesnut, as set forth in the syllabus, said: Action of a court in allowing or disallowing petition to bring in a third-party is a matter in the sound discretion of the court. Rule permitting bringing in of third-party defendant on ground that he might be liable to either

plaintiff or defendant should be liberally applied in order to avoid unnecessary duplication of litigation when there is no jurisdictional objection.

Now, in the case of Dyke versus Sechrist, Your Honor, the original
16 case involved an accident among trucks in Maryland and the matter which was sought to be made the subject of a third-party complaint had to do with loading a truck in a state other than Maryland and there was only a remote connection.

On the other hand, in the case of New York, New Haven and Hartford Railroad Company versus United States of America with McAllister Brothers, Inc. as third-party defendants, we have this situation: The United States was sued for certain freight charges. The United States counter-claimed on the ground that the railroad had damaged the tug and then the United States also brought in McAllister Brothers on the ground that McAllister Steamships — there was a defense that the accident was caused not by the tug but by McAllister Steamships, so the United States also brought them in.

So there we have a case where all parties were brought before the court although initially the suit was for freight charges, and this accident which occurred also became a subject to be determined in one and the same case.

That is another case in which the court held additional parties can be brought in when their presence is required for granting of complete relief in determination of the counter-claim. Now, that discusses both Rule 14(a) and 14(b). That case is at 21 Federal Rules Decisions, page 328.

17 May it please Your Honor, the real question here goes to how serious that 1946 amendment was. There is no question about it, before the 1946 amendment with the set of facts we have here, Drug Fair could have been brought in. But my opponent's contention is that since, by the 1946 amendment, the words "the plaintiff may have a claim against" were eliminated that we have to show that the defendant has a claim against Drug Fair in order to bring them in; and I respectfully submit to Your Honor that by a

liberal interpretation of the Rule that Your Honor doesn't have to say that Courembis has to show a cause of action. All he has to show is a claim.

I don't want to be repetitious but I believe that by outlining the facts, I have shown Your Honor that Courembis does have a claim against Drug Fair which satisfies the requirements of Rule 14.

THE COURT: Very well.

REBUTTAL ARGUMENT BY MR. LYONS

MR. LYONS: If Your Honor please, our position is not, of course, dependent on any scholastic distinction between the words "cause of action" and the word "claim". Whether you call it a cause of action or a claim, what the Third-Party talks about – and it, of course, does talk

18 about claims – is that the Third-Party plaintiff must not only have a claim against the prospective Third-Party defendant but the claim must be one of this nature: that is, a claim that a person not a party to the action is or may be liable to him – to the original defendant, that is – for all or part of the plaintiff's claim against him.

The Rule does not allow claims against third-parties to be brought in at large; they have to be claims that the third-party is or may be liable to the original defendant for all or part of the original plaintiff's claim against the original defendant.

Now, counsel for the Third-Party plaintiff has stated two types of claims, neither of which meets this definition. The first is that Dixon and Company has a claim against Drug Fair, that is that Dixon's services enriched Drug Fair rather than enriching Dixon's client. Now, that, since 1946, is no longer a basis for a joinder under Rule 14.

The other basis that he mentioned was that – as he put it – he claims that Courembis has a claim against Drug Fair. But, Your Honor, in my worthy opponent's presentation to you, you did not hear any explanation of how that claim against Drug Fair was a claim that Drug Fair would be liable to Courembis, that is to this landlord, for all or for

19 part of what the real estate broker was claiming from him.

He cited again the ROA case and some general language that Judge Rayfiel spoke in that case in pronouncing his opinion. But that case was a case in which the third-party plaintiff claimed that the third-party defendant was an indemnitor in respect of the claims which the original plaintiff had asserted against the original defendant.

Thank you, Your Honor.

ORAL RULING OF THE COURT

THE COURT: The Court is of the opinion, after hearing the arguments in this case and having reviewed the pleadings and the collateral matters relating to the condemnation proceedings, that the case is not one in which a third-party complaint is proper.

The Court will grant the motion to dismiss the third-party complaint.

MR. LYONS: May I submit a form of order to Your Honor?

THE COURT: You may.

(Document handed to the Court and to opposing counsel.)

(Whereupon, the hearing on motion in the above-entitled matter was concluded.)

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BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,175

LOUIS J. COUREMBIS and DOROTHY W. COUREMBIS,
Appellants,

v.

INDEPENDENCE AVENUE DRUG FAIR, INC., ET AL., *Appellees.*

Appeal from an Order of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

APPELLEES' STATEMENT OF QUESTIONS PRESENTED

In the opinion of Appellees, the questions presented are:

1. Whether an order of the District Court granting the motion of Third-party Defendants impleaded under Rule 14 of the Federal Rules of Civil Procedure, to dismiss the Third-party Complaint against them, is a "final judgment" and appealable to this Court under 28 U.S.C. § 1291, absent an express determination by the District Court, pursuant to Rule 54(b), "that there is no just reason for delay" and absent an express direction, pursuant to that Rule, for the entry of judgment?

2. Whether a Third-party Complaint which merely alleges matters (i) in respect of which the Third-party Defendants might be liable to the Original Plaintiff, and (ii) in respect of which Third-party Defendants might be liable to the Original Defendants, but not in respect of the Plaintiff's claim against the Original Defendants, states a claim of a nature eligible to be asserted under the "Third-party Practice" provided by Rule 14?

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TABLE OF AUTHORITIES

CASES:

* Cases or authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEES

APPELLEES' STATEMENT OF THE CASE

This is an action commenced in the District Court by a real estate broker, James L. Dixon & Co. ("Broker" or "Plaintiff") for fees or other compensation for its services rendered to the Broker's principal, a landlord, Louis and Dorothy Courembis ("Landlord" or "Defendants") in connection with the remodeling and long-term leasing of certain premises to a tenant, a "Drug Fair" store. (J.A. 1-2; 5-6). The arrangement between Broker and Landlord was that Broker would receive a commission of 5% on the rentals paid by Tenant to Landlord. (J.A. 1). The actual tenancy under the lease commenced on or about May 1, 1960 (J.A. 1), and shortly thereafter, in December 1960,

the United States filed a Declaration of Taking, pursuant to the power of eminent domain, which extinguished Landlord's title and Tenant's tenancy. (J.A. 2). In a negotiated settlement with the United States, the Landlord and the Tenant each received compensation for their property interests taken. (J.A. 2).

The theory of the Complaint of the Plaintiff below, the real estate Broker, was that notwithstanding the condemnation—which cut short the monthly payment of rent and the 5% commission on the Tenant's monthly rental which the Broker was receiving from Landlord—the Broker was entitled to further compensation for its services. (J.A. 1-2; 5-6). Upon a motion to dismiss, the District Court (Curran, J.) held that the Complaint stated a claim upon which relief might be granted.

Thereafter, the Landlord took steps to cause a Third-party Summons and Complaint to be served upon Independence Avenue Drug Fair, Inc., the subsidiary corporation which had occupied the premises under the lease, and upon Drug Fair—Community Drug Co., Inc., the parent "Drug Fair" corporation. (J.A. 7-9). (Hereafter for convenience sometimes collectively referred to as "Tenant"). That Third-party Complaint alleged that it was Tenant "who benefited from the lease in question" in that it received a substantial settlement in the condemnation proceedings; and that "while denying any liability to the plaintiff corporation herein, such damages as said plaintiff corporation may be able to prove for services rendered and/or for enhancing the value of the parcel of real estate were rendered for the benefit of cross-defendant corporations [Tenant] and cross-defendant corporations did, in fact, benefit from said lease and were the only legal entity which did so benefit." (J.A. 9). The Third-party Complaint also contained various allegations of misrepresentation and overreaching on the part of Tenant's officers during the lease negotiations. (J.A. 8-9). The Third-party Complaint

concluded with a prayer that "any sum which plaintiffs [Broker] can prove by way of damages shall be assessed against cross-defendants [Tenant], together with costs." (J.A. 9).

Simultaneously with the filing of the Third-party Complaint, the Landlord filed an answer suggesting various derelictions of the duties owed by the Broker to its client, the Landlord, in connection with the negotiations of the lease in question; and filed a counterclaim against the Broker, based on substantially the same allegations, whereby Landlord sought a judgment against the Broker in an amount equivalent to the amount awarded the Tenant as compensation for the taking of Tenant's leasehold interest. (J.A. 11-12; 12-15).

Tenant duly filed a motion to dismiss the Third-party Complaint on the ground that it did not comport with the requirements of Rule 14, Federal Rules of Civil Procedure. (J.A. 15, 23). The basis of the motion was that the Third-party Complaint did not meet the test of Rule 14 that it state a claim in respect of which the Third-party Defendants "are or may be liable to him [the Original Defendant—Third-party Plaintiff] for all or part of the plaintiff's claim against him [the Original Defendant—Third-party Plaintiff]."

After the filing of legal memoranda and oral argument, the District Court (Tamm, J.) on June 5, 1962, entered an Order (J.A. 21-22) reciting that "it is hereby ordered that Third-Party Defendants' Motion to Dismiss Third-Party Complaint is hereby granted, and the Third-Party Complaint herein is hereby dismissed." The District Court made no "express determination" of the sort contemplated by Rule 54(b) (in appropriate cases) that there was "no just reason for delay"; nor did it make any "express direction for the entry of judgment," as referred to in that Rule. The Landlord filed a Notice of Appeal from this Order (J.A. 22), which commenced the present appellate proceedings in this Court.

STATUTES AND RULES INVOLVED

1. Rule 54(b), Federal Rules of Civil Procedure, as amended in 1961, reads as follows:

> "(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

2. In pertinent part, Rule 14, Federal Rules of Civil Procedure, as amended in 1946, effective 1948, reads as follows:

> "(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move ex parte or, after the service of his answer on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

3. 28 U.S.C. § 1291 reads as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

SUMMARY OF ARGUMENT

1. The Order appealed from is not a "final judgment" and consequently this appeal must be dismissed. The weight of authority before 1961 established that an Order dismissing the action as to one of multiple parties was not a final judgment and that no appeal from it lay. This rule was followed in the case of dismissals of Third-party Complaints. The 1961 amendment to Rule 54(b) provided that, in cases of this sort, the District Court could make certain findings which would constitute the Order a final judgment subject to immediate appeal; but absent those findings, the Order was not final. Those findings were not made here, and consequently the Order appealed from is not a "final judgment" and the appeal must be dismissed.

2. The action of the District Court in dismissing the Third-party Complaint was manifestly correct. Rule 14 allows the bringing in of Third-party Defendants who are alleged (a) to be liable to the Original Defendant (b) for all or part of the Original Plaintiff's claim against the Original Defendant. Here, the Third-party Complaint only alleged (i) matters in regard to which the Third-party Defendants might be liable directly to the Original Plaintiff; and (ii) matters in which the Third-party Defendants might be liable to the Original Defendant, but not having any connection with the claim of the Original Plaintiff against the Original Defendant. Neither of these categories of claims meets the standard of Rule 14, and hence the Third-party Complaint was properly dismissed.

ARGUMENT

I. The Order Dismissing the Third-party Complaint Was Not a "Final Judgment" from Which an Appeal to This Court Can Lie

Prior to the 1961 amendment to Rule 54(b) of the Federal Rules of Civil Procedure, it was well established that an Order dismissing an action with respect to some, but not all, of the parties was not a final judgment from which

an appeal could be taken under 28 U.S.C. § 1291. See, *e.g.*, *Mull* v. *Ackerman*, 279 F. 2d 25 (2d Cir. 1960); *Richards* v. *Smith*, 276 F. 2d 652 (5th Cir. 1960); *Hardy* v. *Bankers Life & Casualty Co.*, 222 F. 2d 827 (7th Cir. 1955); *Steiner* v. *Twentieth Century-Fox Film Corp.*, 220 F. 2d 105 (9th Cir. 1955). This principle was applied to dismissals of Third-party Complaints, which were held likewise not to constitute final judgments. *Baltimore & Ohio R. Co.* v. *United Fuel Gas Co.*, 154 F. 2d 545 (4th Cir. 1946); *Sechrist* v. *Dyke*, 256 F. 2d 881 (4th Cir. 1958).[1] In the latter case, the Court declared that:

> "It is the well settled rule that an order dismissing a third-party complaint or refusing to do so is not a termination of the litigation from which an appeal can be taken." (256 F. 2d, at 882).

The Rules Committee in 1961 proposed, and the Supreme Court adopted, an amendment to Rule 54(b) which would permit these Orders to be made appealable if the District Court made certain findings with respect to them. It added, to the previous procedure under Rule 54(b), which simply covered multiple *claims*, language making the Rule applicable to cases of multiple *parties*.[2] The rule change made

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1 Appellants have cited two cases as to the contrary (Apts. Br. 12): *Gartner* v. *Lombard Bros., Inc.*, 197 F. 2d 53 (3d Cir. 1952), where the merits of an appeal from an Order dismissing a Third-party Complaint were considered without discussion of the jurisdictional point; and *Moreno* v. *United States*, 120 F. 2d 128 (1st Cir. 1941), where the question of appealability of an Order dismissing a Third-party Complaint was not involved, but simply that of an Order dismissing an individual claim in a multi-claim lawsuit. Certainly the *Gartner* case does not detract from the weight of authority to the contrary. In any event, for reasons which will be developed below, since 1961 the matter has been governed by amended Rule 54(b) and under that Rule, the present Order is clearly not appealable.

2 The Advisory Committee's note to the 1961 amendment describes the line of cases which by then had grown up in the Courts of Appeals, to the effect that an order dismissing an action as to one of multiple parties, was not appealable (even with a District Court finding purporting to invoke the pre-1961 form of Rule 54(b)), as a "consistent" line of cases, and states that the courts were "committed" to that view. The Advisory Committee's note is reproduced at pp. 7-8 of the 1961 Cumulative Supplement to volume 6, Moore's Federal Practice (2d ed.).

Orders of this sort eligible for the Rule 54(b) procedure whereby, if the District Court makes "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment," an appealable "final judgment" may be entered. The amended rule expressly refers to a "Third-party claim."

However, the Order in question here, which was entered upon notice to appellants (J.A. 33), contains no such determination or direction. Accordingly, the second sentence of amended Rule 54(b) is applicable:

> "In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates . . . the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the . . . parties."

Accordingly, the Order of the District Court appealed from not only is of a sort which, before 1961, was held by the overwhelming weight of authority not to be appealable; it is expressly declared, by the amended Rule 54(b), not to be a final judgment. As such, it cannot be the subject of an appeal to this Court under § 1291 of the Judicial Code. Accordingly, the appeal should be dismissed.

II. The Third-party Complaint Does Not Allege a Claim in Respect of Which Third-party Defendants Are or May Be Liable to the Original Defendants for All or Part of the Plaintiff's Claim Against Them, as Required by Rule 14

A. Rule 14 of the Federal Rules of Civil Procedure imposes two separate requirements upon a Third-party Complaint: (i) It must state a claim as to which the Third-party Defendant is or may be liable to the Original Defendant; and, (ii) that liability must be one "for all or part of the Plaintiff's claim" against the Original Defendant. As Professor Moore points out, impleader under Rule 14 "is not permissible unless these conditions are complied with; it is not a device for bringing into an

action any controversy which may happen to have some relationship with it." 3 Moore, Federal Practice (2d ed. 1948), p. 413; See also *Id.*, pp. 418-19. Numerous cases make it plain that these two conditions must be met before a Third-party Complaint will be permitted under Rule 14. See, *e.g.*, *Philadelphia* v. *National Surety Corp.*, 140 F. 2d 805 (3d Cir. 1944); *Heitman* v. *Davis*, 119 F. 2d 975 (7th Cir. 1941); *Barnard-Curtiss Co.* v. *Maehl*, 117 F. 2d 7 (9th Cir. 1941); *Non-Ferrous Metals, Inc.* v. *Saramar Aluminum Co.*, 25 F.R.D. 102 (N.D. Ohio 1960); *Kohn* v. *Teleprompter Corp.*, 22 F.R.D. 259 (S.D.N.Y. 1958); *Patrick* v. *Beasley*, 15 F.R.D. 205 (S.D.N.Y. 1953); *United States* v. *DeHaven*, 13 F.R.D. 435 (W.D. Mich. 1953); *North Dakota* v. *Przybylski*, 98 F. Supp. 21 (D. Minn. 1951); *Liberty Mutual Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17 (D.D.C. 1950); *Fowler Industrial Service, Inc.* v. *John Mohr & Sons Co.*, 10 F.R.D. 271 (N.D. Ohio 1950).

B. Putting the test in the language of this case, it was requisite of the Third-party Complaint here that it allege some basis (i) on which the Tenant was, or might be, liable to the Landlord, (ii) for all or part of the Broker's claim against the Landlord.

None of the matters alleged in the Third-party Complaint meets those standards, and it is significant that the appellants in this Court never try to measure their Third-party Complaint against those standards; in fact, they appear to suggest that the explicit standards of Rule 14 should be ignored. (Apts. Br. 8-9).

The Landlord, appellants here, upon analysis of their Third-party Complaint, make two kinds of allegations: (1) *First*, they allege that the real estate Broker's services enriched the Tenant rather than the Landlord.[3] At most, these allegations might be a basis for a claim, albeit a very far-fetched one, by the Broker against the Tenant; certainly

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[3] This was the primary basis of appellants' argument in the District Court. (J.A. 29).

they supply no basis on which the Landlord would be entitled to reimbursement by the Tenant for any sums the Landlord may have to pay the Broker—which is the essential test of Rule 14. An allegation that the Third-party Defendant may be liable to the Original Plaintiff does not support a Third-party Complaint under Rule 14.[4] *Kohn* v. *Teleprompter Corp.*, 22 F.R.D. 259, 260-61 (S.D.N.Y. 1958). Appellants have not pointed to any doctrine of substantive law to the effect that where the services of a Broker to his client, a Landlord, enriched the other party to the transaction, the Broker is entitled to compensation from his client but in turn, the client is entitled to indemnity from the Tenant, the other party to the transaction. Yet, the existence of such a far-fetched doctrine of substantive law is necessary for these allegations to state a claim meeting the standards of Rule 14.

At the most, these allegations of the Third-party Complaint say that the Broker was unfaithful in its duty to the Landlord and served the Tenant rather than the Landlord. Such an allegation might well be the basis (and it is set up as such in the Landlord's Answer, J.A. 11-12) for a denial of compensation due from the Landlord to the Broker. (See Restatement, Agency 2d, § 387). If the Broker committed any breach of duty to the Landlord, the Landlord may be able to make out the defense asserted against the Broker's claim and possibly make good the counterclaim which has been asserted against the Broker (J.A. 12-15); but these allegations do *not* supply any basis whereby the Landlord may claim that the other party to the transaction, the Tenant, should reimburse him for moneys which he may owe his Broker—the essential test

[4] Originally, Rule 14 permitted the Original Defendant to bring in a third party simply on the basis that the third party "is or may be liable . . . to the Plaintiff for all or part of the Plaintiff's claim against him [the Original Defendant]." See 3 Moore, p. 403. This provision proved to be unworkable and was specifically deleted by a rules change made in 1946, effective in 1948. See the Advisory Committee note reproduced at 3 Moore, pp. 405-06.

of Rule 14. Rather, these allegations, if established, may simply lead to a conclusion that the Landlord does not owe the Broker anything.

(2) *Secondly,* the Third-party Complaint contains suggestions of misrepresentation and overreaching by the Tenant towards the Landlord in the negotiation of the lease. Taking these allegations as true for the purposes of the motion to dismiss, such allegations might, if substantiated, in some context create a general liability of the Tenant to the Landlord for any damages thereby sustained by the Landlord; but they do *not* suggest any basis under which the Tenant may be liable to the Landlord *in respect of the Broker's claim for compensation against the Landlord.* What relationship any claim based on these allegations has to do with making the Tenant, the other party to the real estate transaction, liable to reimburse the Landlord for the Landlord's broker's compensation claim against the Landlord, defies imagination. Yet, unless the claim is of this sort, one going to reimbursement or indemnification of the Landlord by the Tenant in respect of the Broker's claim, it does not meet the test of Rule 14. See *Liberty Mutual Ins. Co.* v. *Vallendingham,* 94 F. Supp. 17, 18 (D.D.C. 1950); *Kohn* v. *Teleprompter Corp.,* 22 F.R.D. 259, 261 (S.D.N.Y. 1958). "There must be an attempt to pass on to the third party all or part of the liability asserted against the defendant." 3 Moore, p. 419.

C. As the authorities make clear (see 3 Moore, pp. 409-10, 420), the "Third-party Practice" provided by Rule 14 has its application in cases of insurors, guarantors, sureties, successive warrantors, joint tort-feasors where an obligation of contribution or indemnification exists, and the like. It is designed to cover cases where there is a third party liable to indemnify the Defendant or make reimbursement to him in respect of the moneys he may owe the Plaintiff. While the Rule is to be liberally construed, the applicability of the basic standard set forth in Rule 14—that

the case must be one of a third party claimed to be liable to indemnify the Defendant or make reimbursement to him in respect of the moneys he may owe the Plaintiff—has never been questioned in the decided cases; and the authorities cited by the appellants present only cases falling well within these limitations.[5]

There was no basis stated in the District Court, nor have the appellants pointed to any basis in this Court, on which the Tenant might be legally obligated to reimburse or indemnify the Landlord for any moneys he might owe the Broker, in respect of the claim asserted by the Broker against the Landlord in this action. Hence the Order of the District Court dismissing the Third-party Complaint on the ground that it did not comply with the standards of Rule 14 was correct. If this Court has jurisdiction at this juncture to review it, that Order should be affirmed.

CONCLUSION

For the reasons stated, the appeal should be dismissed. Alternatively, should the Court view itself as having appellate jurisdiction over the Order of the District Court in

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[5] To review the cases cited by appellants (Apts. Br. 9, 11): In *Dery* v. *Wyer*, 265 F. 2d 804 (2d Cir. 1959), the Original Defendant claimed indemnity under an express contract with the Third-party Defendant in respect of a tort claim asserted by the Original Plaintiff against the Original Defendant. The case's language as to the liberal construction of Rule 14 relates only to the Court's holding that no independent basis of federal jurisdiction was needed to support the Third-party Complaint—a claim which clearly met the standards of Rule 14. In *Dyke* v. *Sechrist*, 21 F.R.D. 240 (D. Md. 1957), the third-party claim was one for contribution between joint tort-feasors; in *Rao* v. *Parking Associates Corp.*, 20 F.R.D. 147 (E.D.N.Y. 1957), the third-party claim was one of indemnity between concurrent tort-feasors; in *Rosalis* v. *Universal Distributors, Inc.*, 21 F.R.D. 169 (D. Conn. 1957), the third-party claim was one for indemnity under an insurance policy, and the issue was whether, as a matter of discretion, the insurer should remain a party to the action; in these three cases, there were presented claims as obviously meeting the standards of Rule 14 as the appellants' here does not. In *Davis* v. *Associated Indemnity Corp.*, 56 F. Supp. 541 (M.D. Pa. 1944), also cited by appellants, the holding was that the Third-party Complaint could not be maintained. In *Blair* v. *Cleveland Twist Drill Co.*, 197 F. 2d 842 (7th Cir. 1952), also cited by appellants, no issue concerning Rule 14 was presented.

the present posture of the case, the Order appealed from should be affirmed.

Respectfully submitted,

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September 1962.

REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,175

LOUIS J. COUREMBIS and
DOROTHY W. COUREMBIS,

Appellants,

v.

INDEPENDENCE AVENUE DRUG FAIR, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRIC OF COLUMBIA

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REPLY BRIEF

QUESTIONS PRESENTED

With regard to the questions set forth in the Brief for Appellees, counsel for appellants respectfully submits that the questions should be as follows:

1. Does Rule 54 (b), F.R.C.P. preclude this Honorable Court from jurisdiction to hear and determine the merits of this appeal and, if so, can now appellants appeal the dismissal of the Complaint Against Third-party Defendants or sue said Third-party Defendants in a separate action in the event that plaintiff corporation should obtain a judgment against now appellants as defendants in the Court below?

2. Did the Court below place such a narrow construction on Rule 14, F.R.C.P. in view of the fact situation, as set forth in the Complaint Against Third-party Defendants (J.A. 7-9) as to have failed to have properly exercised the discretion reposed in the Court below?

STATEMENT OF THE CASE

It is believed that the statements contained in the briefs filed herein have given to this Honorable Court the necessary information as to background material and the factual basis of this appeal. With regard to the statement contained in the Brief of Appellee (page 2), "Upon a motion to dismiss, the District Court (Curran, J) held that the Complaint stated a claim upon which relief might be granted," it is respectfully submitted that there was no significance to said ruling other than that the Motion to Dismiss was denied.

References to "overreaching" in the Statement of the Case in the Brief for Appellees is an understatement. It is respectfully submitted that a reading of the Complaint Against Third-party Defendants and the Answer and Counter-Claim (J.A. 7-15) showed that the Secretary of the appellee corporations made an inaccurate statement, that he intended that the now appellants should rely upon same, that they did rely upon same and that the appellants suffered a severe loss and appellees enjoyed a splendid recovery in the settlement of the eminent domain case as a result thereof. Said pleadings in the Court below show wherein the Vice-President of the plaintiff corporation made similar inaccurate

statements. It is respectfully submitted that the sum total of these statements is more serious in nature than the mere allegation of "overreaching."

ARGUMENT

With Regard to Contention of Counsel for Appellees to the Effect That the Order Dismissing the Third-Party Complaint Was Not a "Final Judgment" From Which an Appeal to This Court Can Lie

It is easy to envision the position which learned counsel for appellees would have taken had counsel for appellants not filed a Notice of Appeal within ten (10) days after the entry of the Order Dismissing Third-party Complaint (J.A. 21-22) and proceeded to prosecute this appeal in a timely manner. Counsel for appellees would have determinedly contended that the claim now in litigation was "res adjudicata."

Now, since this appeal is being prosecuted, counsel for appellees contend that Rule 54 (b) causes this appeal to fail to meet the conditions of 28 U.S.C. Section 1291. They now contend that the Order Dismissing Third-party Complaint is not a final judgment.

If it could be determined that substantial justice could be afforded to appellants by allowing them to appeal the Order Dismissing Third-party Complaint or by allowing now appellants to sue now appellees in the event that plaintiffs should obtain a judgment against now appellants in the Court below, there could be some merit to the argument of counsel for appellees, excepting only that either of such alternatives would establish such a cumbersome procedure as to defeat the obvious purpose of Rule 14, F.R.C.P.

The first four cases cited by counsel on page 6 of the Brief for Appellees, namely, Mull v. Ackerman, 279 F.2d 25; Richards v. Smith, 276 F.2d 652; Hardy v. Bankers Life and Casualty Co., 222 F.2d 827; and Steiner v. Twentieth Century Fox Film Corporation, 220 F.2d 105,

involve dismissals as to one or more of several Original Defendants. They are, therefore, far from compelling with regard to the case at bar.

It is respectfully submitted that a study of the next case cited by counsel for appellees, namely, Baltimore and Ohio R. Co. v. United Fuel Gas Co., 154 F.2d 545, brings one to the conclusion that the controlling factor in the case was lack of "diversity of citizenship." Nevertheless, the Circuit Court of Appeals for the Fourth Circuit made it clear that if the judgment in the Court below should go against the B. & O. Ry., it could then appeal the dismissal of the Third-party Complaint.

The case of Sechrist v. Dyke, 256 F.2d 881, involved not only the question of diversity of citizenship but also the matter of the petition to bring in Third-party Defendant having been filed after depositions had been taken. The Court below had held that the dismissal of the Third-party Complaint would not prejudice the rights of the defendants, in the event that they were held liable to the plaintiff, to press a separate suit against the Third-party Defendant as joint tort-feasor. It was with this situation in mind that the Circuit Court of Appeals for the Fourth Circuit used the strong language, as quoted by counsel for appellees on page 6 of the Brief for Appellees.

A review of the cases of Moreno v. United States, 120 F.2d 128, and Gartner v. Lombard Brothers, Inc., 197 F.2d 53, causes counsel for appellants to take issue with the note at the foot of page 6 of the Brief for Appellees,in which said note it is contended that such cases do not furnish precedent to the effect that the dismissal of a Third-party Complaint is a final appealable order.

However, this Honorable Court has the authority to review interlocutory orders of the United States District Court for the District of Columbia, under 28 U.S.C. Section 1292(b), by compliance with Rule 9 1/2 of this Honorable Court. The argument of counsel for appellees, therefore, boils down to a contention that counsel for appellants should have followed the procedures of said Rule 9 1/2 instead of basing this appeal upon 28 U.S.C. Section 1291.

It is respectfully submitted that even if this Honorable Court agrees with said contention of appellees, this Honorable Court should proceed to hear the merits of this appeal and that the first major contention of counsel for appellees, being a technical point of law, should be resolved against counsel for appellees.

As to Appellees' Contention to the Effect That the Third-party Complaint Does Not Allege a Claim in Respect of Which Third-party Defendants Are or May Be Liable to the Original Defendants for All or Part of the Plaintiff's Case Against Them, as Required by Rule 14.

In view of the fact that the Court below did not state the specific basis upon which the Court granted the Motion to Dismiss the Complaint Against Third-party Defendants (J.A. 33), counsel for appellants felt called upon, in the arguments in the Brief for Appellants, to cover every basis which had been set forth in the Points and Authorities in Support of the Motion to Dismiss Third-party Complaint (J.A. 16-19) and the argument of counsel for now appellees in the Court below (J.A. 23-25 and 32-33).

In the Brief for Appellees, counsel for appellees based their case upon contentions that Rule 14, F.R.C.P., requires that a Third-party Complaint state a claim as to which the Third-party Defendant is or may be liable to the Original Defendant and that such liability must be for all or part of the Plaintiff's claim against the Original Defendant. Applying this test to the case now on appeal, learned counsel for appellees contend that it was necessary that the Third-party Complaint, in the case at bar, allege some basis on which the Tenant was, or might be, liable to the Landlord for all or a part of the Broker's claim against the Landlord.

In analyzing the situation in the case at bar, it becomes essential to again review the case of Polley v. Plainshun Corp., 186 N.Y.S.2d 295, because said case was the basis upon which Judge Edward M. Curran

denied now appellants' Motion to Dismiss the original Complaint for Debt for Services Rendered. A study of said case brings one to the conclusion that the only basis whereby a real estate broker may have a cause of action, when the property in question has been condemned by the Government, is where there has been an enhancement in the value of the real estate, due to the leasing, which has caused an increase in the condemnation award.

In the case at bar, it was the appellee corporations, as tenant, and not the appellants, as landlord, which enjoyed the handsome profit, in the settlement of the eminent domain case, from the re-modeling of the premises and the first few months of operation of the Drug Fair store. The Complaint against Third-party Defendants (J.A. 7-9) spells out the misrepresentations on the part of the Secretary of now appellee corporations, the reliance of appellants upon such statements, the basis upon which now appellee corporations came unto such a favorable bargaining position and the benefits which now appellee corporations received pursuant thereto.

The Answer and Counter-Claim filed herein (J.A. 10-15) show wherein the Vice-President of the plaintiff corporation induced now appellants to enter into the lease and re-model the premises in question on the basis of the representations of the Secretary of appellee corporations.

Counsel for now appellants cannot now say that the Secretary of appellee corporations and the Vice-President of plaintiff corporation conspired to cause now appellants to enter into the lease. However, the combination of the Secretary of appellee corporations having made the misrepresentations which were relied upon by now appellants, the Vice-President of plaintiff corporation having induced now appellants to enter into the lease and remodel the premises in question, and the now appellee corporations having received such a handsome remuneration in the settlement of the eminent domain case, all tie-in to refute the contention

of counsel for appellees to the effect that there is no relationship between the claim of plaintiff corporation as Brokers against appellees as Landlords and the effort of appellants to bring in appellee corporations as Tenants.

Counsel for appellees contends that appellants have not pointed to substantive law whereby to sustain the Third-party Complaint against appellee corporations as tenants. Counsel for appellees have worked their client out of this case, on technicalities of Rule 14, F.R.C.P., in the Court below, and now they are calling for the basis of the prayers which now appellants would have to produce before the Trial Judge in the Court below would make his charge to the jury. The principle question in this appeal is whether or not the Court below erred in placing too narrow an interpretation on Rule 14, F.R.C.P., and in doing so, holding that the Complaint against Third-party Defendants should have been dismissed and not whether now appellants can show any more than that their claim is based upon the allegations of the Complaint against Third-party Defendants, as tied-in with the Answer and Counter-Claim, as referred to hereinabove. Again, we are brought back to the fact situation in the case now on appeal growing out of the misrepresentations of the Secretary of appellee corporations, as set forth hereinabove. Without stating the conclusion of law which the Complaint against Third-party Defendants spells out, it is respectfully submitted that same does state a firm case as a matter of substantive law.

It is respectfully submitted that the cases cited by counsel for appellees, on page 8 of the Brief for Appellees, do not overcome the contention of counsel for appellants to the effect that the Court below placed too narrow a construction on Rule 14, F.R.C.P., in dismissing the Complaint against Third-party Defendants.

The case of Philadelphia v. National Surety Corp., 140 F.2d 805, involved a claim against a Third-party defendant which, according to the decision of the Circuit Court of Appeals for the Third Circuit, had nothing

whatsoever to do with the original case (page 809 of the decision).

In the case of Heitman v. Davis, 119 F.2d 975, the Circuit Court of Appeals for the Seventh Circuit held that it was obvious that the impleaded Lowell National Bank was not a party liable to the impleader.

In the case of Barnard-Curtiss Co. v. Maehl, 117 F.2d 7, the Circuit Court of Appeals for the Ninth Circuit held that there was no showing to the effect that the Third-party defendant was or might be liable to the defendant or the plaintiff for all or part of plaintiff's claim against defendant.

The decision of the Court in the case of Non-Ferrous Metals Inc. v. Saramar Aluminum Co., 25 F.R.D. 102, was the same as in the case of Philadelphia v. National Surety Corp., supra.

Although counsel for appellees rely heavily upon the case of Kohn v. Teleprompter Corp., 22 F.R.D. 259, the United States District Court for the Southern District of New York ruled that the Third-party Complaint alleged a claim which was separate from and independent of the Original Complaint.

In the case of Patrick v. Beasley, 15 F.R.D. 204, the United States District Court for the Southern District of New York held that a simple cause of action for professional services allegedly rendered by plaintiff to defendant should not become entangled with an involved action concerning a joint venture between the original defendant and the third-party defendant on matters entirely unrelated to the claim of the plaintiff.

The case of United States v. DeHaven et al., 13 F.R.D. 435, is another one in which the Complaint against Third-party Defendant was not related to the original cause of action.

The case of North Dakota v. Przybylski, 98 F. Supp. 21 (D. Minn. 1951), turned, to a large extent, on the substantive law of the State of North Dakota with regard to contribution between joint tort-feasors. The United States District Court for the District of Minnesota, First

Division, held that the third-party plaintiffs had merely assumed to state that the third-party defendants may be liable to the plaintiff for all or part of the latter's damage. Also, the Court noted that since the 1948 Amendment to Rule 14(a), F.R.C.P., the only person who can be brought in under that rule is a person secondarily liable to the original defendant.

The case of Liberty Mutual Ins. Co. v. Vallendengham, 94 F. Supp. 17 (D.D.C. 1950), which is also heavily relied upon by counsel for appellees, involves the liability of an employer who carries Workmen's Compensation Insurance, with respect to an injury sustained by one of his employees in the course of his employment. This case also involved an interpretation of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Section 905. Judge Alexander Holtzoff ruled that Rule 14, F.R.C.P., is limited to cases in which the Third-party plaintiff seeks to recover from the Third-party defendant on a secondary liability arising out of the plaintiff's claim against the original defendant.

The decision in the case of Fowler Industrial Service, Inc. v. John Mohr & Sons Co., 10 F.R.D. 271 (N.D. Ohio 1950), involved an effort by a Third-party defendant to bring in an additional Third-party defendant. Said decision was predicated upon the fact that there could not have been any liability on the part of this second Third-party defendant to the original defendant. The Court emphasized the fact that the original defendant and only that defendant has the right to bring in a Third-party defendant.

The sum total of the enlightenment to be derived from the foregoing line of cases is that the Third-party defendant must be secondarily liable to the original defendant for all or a part of plaintiff's claim against the original defendant. In view of appellee corporations tie-in with the transactions in question (by reason of the misrepresentation of the Secretary of said corporation) and the result of said misrepresentation as brought out hereinabove, could it possibly be now said that appellee corporations would not be secondarily liable for any damages which plaintiff corporation

could possibly prove against now appellants? Isn't this contention strengthened by the statements of the Vice-President of plaintiff corporation in which he gave support to the misrepresentations of the Secretary of now appellee corporations? It is respectfully submitted that the fact situation in the case now on appeal meets the test as set forth in the cases cited by counsel for appellees and analyzed hereinabove.

Without again citing the cases, it is again respectfully submitted that the cases relied upon in the Brief for Appellant support the contention of counsel for appellants that the Court below placed too narrow a construction on Rule 14, F.R.C.P. in dismissing the Complaint against Third-party Defendants in the case now on appeal.

In the case of United States v. Yellow Cab Co., 340 U.S. 543, decided February 26, 1951, on page 556 of the Majority Opinion by Mr. Justice Burton, the following language was used:

> "The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings."

This quotation, it is respectfully submitted, supports above-made contention of counsel for appellants.

In closing his address before the Judicial Conference of the Sixth Circuit in Louisville, Kentucky, on April 13, 1962, on the subject "Entry of Additional Parties in a Civil Action: Intervention and Third Party Practice," Judge Alexander Holtzoff used the following language:

> "Observing and contemplating the results obtained by the use of third-party practice in the light of actual experience with it, one inevitably reaches the conclusion that third-party practice is an important achievement and a far-reaching progressive advance in the direction of simplifying civil procedure in the Federal courts, eliminating circuity of action and reducing the time consumed and the money expended in litigation. It is one of the many outstanding improvements introduced by the epoch-making

> Federal Rules of Civil Procedure. Its use deserves to be encouraged and expanded."

It is further respectfully submitted that the fact situation in the case now on appeal, as explained hereinabove, is such that the claim against now appellees was at least "ancillary" to the case of plaintiff corporation against now appellants. The question of whether or not the claim against Third-party Defendant is so closely involved with the subject matter as to be regarded as ancillary thereto ordinarily arises in diversity of citizenship cases. Barron and Holtzoff, Chapter 7, under heading "Third-Party Practice, Section 424, pages 650-651, and quoted in Braun v. Hecht Co., D.C. N.Y. 1957, 21 F.R.D. 391. The relationship between the misstatements of the Secretary of now appellee corporations and the Vice-President of plaintiff corporation were so closely tied-in with the execution of the lease upon which plaintiff corporation relies in the Court below that the Complaint Against Third-Party Defendants filed in the Court below more than met the test of stating a claim which was "ancillary" to the case brought by plaintiff corporation against now appellants.

CONCLUSION

The appeal of the dismissal of the Complaint Against Third-Party Defendants filed in the Court below could have been the subject of an application for an Interlocutory Appeal pursuant to Rule 9 1/2 of the Rules of this Honorable Court. Substantial justice cannot be afforded to appellants if this appeal is denied on the first major point of the argument in the Brief for Appellees unless this Honorable Court rules that appellants may either appeal such dismissal of the Complaint Against Third-party Defendant or file a separate suit against now appellee corporations in the event that plaintiffs in the Court below should prevail against now appellants. It is respectfully submitted that either of these alternatives would place this case in such a cumbersome posture as to defeat the intention of Rule 14, F.R.C.P.

A Judge of the United States District Court has a discretion in the matter of denying or granting a Motion to Dismiss a Complaint against Third-party Defendant. If the Third-party Defendant is secondarily liable or if the claim against him is ancillary to the case at bar, the Judge of the United States District Court should exercise his discretion by denying the Motion to Dismiss. The tie-in of Third-party Defendants, now appellees, in the case at bar with the case of plaintiff corporation against now appellants has been explained hereinabove. It is respectfully submitted that the Court below, in the proper exercise of judicial discretion, should have denied the Motion to Dismiss the Complaint Against Third-party Defendant and that the granting of said motion was such a narrow construction of Rule 14, F.R.C.P., as to constitute error which should cause this Honorable Court to order a reversal.

Respectfully submitted,

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